90-9180

No. _____

In The

Supreme Court of the United States

October Term, 1990

CHRISTINE FRANKLIN,

Petitioner,

v.

GWINNETT COUNTY PUBLIC SCHOOLS,
a Local Education Agency (LEA);
DR. WILLIAM PRESCOTT, an Individual,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I.

Whether Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, *et seq.* allows victims of intentional discrimination to recover compensatory damages under the authority of *Guardians Ass'n v. Civil Service Commission of the City of New York,* 463 U.S. 582 (1983).

II.

Whether Title IX of the Education Amendments of 1972, 20 U.S.C. § 1618 *et. seq.*, which is based on Congress' authority to enforce the Fourteenth Amendment, authorizes recovery of compensatory damages for intentional violations of this statute.

PARTIES

Petitioner-Plaintiff below is an individual who alleges that she was subjected to sexual discrimination in violation of Title IX of the Education Amendments of 1972. Respondent is Gwinnett County Public Schools. Gwinnett County Public Schools is a local education agency and includes North Gwinnett High School where the alleged sexual discrimination took place. Respondent, Dr. William Prescott, was the band director at North Gwinnett High School. He has been sued in his individual capacity.

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MISCELLANEOUS

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported: *Franklin v. Gwinnett County Schools, a Local Education Agency (LEA), Dr. William Prescott, an Individual,* 911 F.2d 617 (11th Cir. 1990), this Opinion is set forth at Appendix A. The Opinion of the United States District Court for the Northern District of Georgia is not reported. It is attached at Appendix B.

JURISDICTION

The judgment sought to be reviewed was entered by the Eleventh Circuit Court of Appeals on September 10, 1990. This judgment is set forth in Appendix C. This Court has jurisdiction to review the judgment of the Eleventh Circuit under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

a) Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, *et seq.* (1988), which provides that, "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."

b) Section 601 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d to 2000d-4(1988) which provides that "No person in the United States shall, on the basis of race, color, or national origin, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

c) The Fourteenth Amendment of the United States Constitution.

d) Title VII of the Civil Rights Act of 1964.

STATEMENT OF THE CASE

A. COURSE OF PROCEEDINGS AND DISPOSITIONS BELOW.

On August 1, 1988, Christine Franklin, a high school student residing in Gwinnett County, Georgia, filed a Complaint against Gwinnett County Public School with the Office of Civil Rights, United States Department of Education, alleging that she had been subjected to sexual discrimination in violation of Title IX of the Education

Amendments of 1972 (20 U.S.C. § 1681, *et seq.*). After a six (6) month investigation, the Office of Civil Rights (hereinafter referred to as "OCR"), on December 14, 1988, found Gwinnett County Public Schools to be in violation of Title IX because Ms. Franklin had been subjected to verbal and physical abuse of a sexual nature. Gwinnett County Public Schools was also found to be in violation of Title IX because it failed to implement a grievance procedure in accordance with Title IX and because Dr. William Prescott (hereinafter referred to as "Prescott"), a former band instructor at Ms. Franklin's school, attempted to intimidate Ms. Franklin into dropping her charges.

On December 28, 1988, Ms. Franklin filed an action in the United States District Court for the Northern District of Georgia against the Gwinnett County Public Schools (hereinafter referred to as "District") and Dr. William Prescott. Ms. Franklin alleged that the District and Dr. Prescott "intentionally discriminated" against her based upon her gender in violation of 20 U.S.C. § 1681, *et seq.* Without answering the Complaint, the Defendants filed a Motion to Dismiss the action for failure to state a claim upon which relief could be granted. Defendants argued, among other things, that compensatory relief was unavailable for violations of Title IX of the Education Amendments of 1972 for intentional discrimination. The District Court agreed and on May 1, 1989, dismissed Ms. Franklin's Complaint for failure to state a claim upon which relief could be granted. The District Court entered its Order on May 5, 1989. Ms. Franklin timely filed her Notice of Appeal and asserted in the Court of Appeals that the judgment of the District Court should have been reversed and the case remanded for additional proceedings.

On September 10, 1990, the Court of Appeals for the Eleventh Circuit affirmed the District Court's dismissal

and entered its Order. Petitioner asserts this timely petition for Writ of Certiorari and this Court has jurisdiction pursuant to 28 U.S.C. § 1254.

B. FACTS.

The following facts were submitted to the Office for Civil Rights, U.S. Department of Education. In accordance with *Conley v. Gibson*, 355 U.S. 41, 45-46, 48 (1957), Plaintiff submits that these facts should be considered as true.

Commencing in September 1986, Andrew Hill (hereinafter referred to as "Mr. Hill"), Christine's 9th grade Economics teacher, befriended her by showing her favoritism in the form of allowing her to grade the class' papers and record the grades. In addition, during the regular classroom hours as all the students completed daily assignments, Mr. Hill took Ms. Franklin to his office in the back of the classroom, which was segregated from the main school in a building known to the students as the "fieldhouse."

While Ms. Franklin and Mr. Hill were together in his office, the two engaged in conversation which, at first, consisted of ordinary topics, including Ms. Franklin's grades, her participation in the school band, her studies, and her boyfriend's activities. Toward the end of the semester, however, Mr. Hill began to direct the conversation toward intimate, sexual topics. For example, Mr. Hill asked Ms. Franklin if she and her boyfriend had engaged in sexual intercourse and whether Ms. Franklin would consider "doing it" with an older man. Mr. Hill opined that older men "knew more than teenage boys" and that Ms. Franklin would have more "fun" having relations with an experienced man. Mr. Hill told Ms. Franklin that the way to be popular with the male students at the high school was to "do it" with a "guy" on the first or second date.

In addition to his inquiries into Ms. Franklin's intimate sexual relationships, Mr. Hill told her that he and

his wife were having sexual problems and that other high school girls "just like Christine" had offered to "help" him with his problem. Specifically, Mr. Hill told Ms. Franklin that his wife declined to have sexual relations with him after delivering a child. Mr. Hill attempted to elicit sympathy from Ms. Franklin, telling her that his wife had sought help for this mental problem.

In addition to the sexually suggestive conversations, Mr. Hill gained Ms. Franklin's attention and favor by flattery. He told her that she "looked good." On another occasion, Mr. Hill told her "you look so good, you better not get me excited." Frequently, the "talks" between Mr. Hill and Ms. Franklin lasted into the next class period. Mr. Hill provided Ms. Franklin with notes to excuse her lateness or would accompany her to the next classroom, interrupt the class, and tell the teacher, "she was with me."

As a result of the frequent association between Mr. Hill and Ms. Franklin, rumors of sexual activity between the two spread throughout the student body. In October 1986, while the Principal was away at a meeting, Mr. Hill approached John David Martis, an Assistant Principal, ostensibly for advice. Mr. Hill told Mr. Martis that Ms. Franklin had been "hanging around" after class, purportedly seeking advice for personal problems involving her relationship with her boyfriend. Mr. Hill stated to Mr. Martis that he thought Ms. Franklin was pregnant. Mr. Hill also added that other female students in the Economics class had begun to make a "big deal" about him talking with Ms. Franklin after class. According to Mr. Martis, Mr. Hill said that he "hated" to turn his back on the girl, "but that he was getting worried about generating rumors among the students."

After hearing of the rumors of sexual conduct between she and Mr. Hill, Ms. Franklin became distressed and approached Michael Blackwood, a teacher in charge of a student writer's club. In a written statement prepared for school authorities, dated March 30, 1988, Mr.

Blackwood acknowledged that he spoke with Ms. Franklin. Ms. Franklin told Mr. Blackwood that she was unsure whether to continue seeing her boyfriend, who has purportedly had relations with another person. Mr. Blackwood also stated that during the same conversation, Ms. Franklin indicated she felt uncomfortable with Mr. Hill because he closed his office door while speaking to her on personal topics.

Ms. Franklin, on the other hand, has stated that the conversation with Mr. Blackwood about Mr. Hill took place subsequent to the discussion concerning her boyfriend. Ms. Franklin stated that when she approached Mr. Blackwood, she was crying and told him that Mr. Hill was making her uncomfortable with his questions about her personal life and that he always shut the door when he spoke with her.

In October 1986, a student placed an anonymous note on Ms. Franklin's desk in her Language Arts class. The note read, "I heard that Coach Hill is good. Is he better than Doug?" Immediately thereafter, Ms. Franklin went to Mr. Hill's classroom at the fieldhouse, asked him to step outside, showed him the note, and expressed her dissatisfaction with the rumors that were circulating around the school. Mr. Hill asked Ms. Franklin to remain calm, but she remained excited and distressed and the conversation carried into the parking lot. After Ms Franklin turned and walked away, Mr. Hill grabbed her arm tightly, pulled her toward him, and kissed her very hard on the mouth. Ms. Franklin freed herself from his grasp and walked away.

After Ms. Franklin returned to band class late, she and her boyfriend had an argument regarding the rumors of sexual activity between she and Mr. Hill. Dr. Prescott, the band leader and a Defendant herein, separated Ms. Franklin and her boyfriend and spoke with Ms. Franklin's boyfriend about the problems with Mr. Hill. The boyfriend told Dr. Prescott that Mr. Hill was asking Ms. Franklin personal questions about the latter's sexual

experiences. Dr. Prescott assured the boyfriend that he would write Mr. Hill a letter indicating that such behavior was unprofessional and unbecoming of a teacher and that Dr. Prescott would be forced to inform a "higher authority" if Ms. Franklin reported late for class or if Mr. Hill asked her questions about her sexuality.

During the spring 1987 school semester, Mr. Hili made similar sexual inquiries of another female student, Courteny Jans. During the spring 1987 school semester, Ms. Jans was a student in Mr. Hill's Economics class. Mr. Hill showed Ms. Jans favoritism and she was perceived as a "teacher's pet." After receiving an inordinate amount of attention from Mr. Hill, Ms. Jans thought of him as a friend and sought his counsel for a personal problem involving a boyfriend.

During a conference with Mr. Hill, he asked Ms. Jans several intimate, personal questions and made intimate, personal statements that went beyond the scope of ordinary counseling. For example, Mr. Hill asked Ms. Jans, "how do you keep your boyfriend satisfied?" Thereafter, Mr. Hill opined that if she kept her boyfriend sexually "satisfied," he would not have assaulted her. Mr. Hill also asked whether Ms. Jans gave her boyfriend oral sex. In addition, Mr. Hill stated, "guys are guys. They need to be satisfied," and "sleep with guys to be popular." At no time did Mr. Hill offer Ms. Jans genuine counseling or refer her to the guidance counselor for assistance.

In early July of 1987, Mr. Hill telephoned Ms. Franklin at her home, informed her that his wife was leaving for the weekend and suggested that he and Christine get together during that time. Ms. Franklin declined. Ms. Franklin maintains that Mr. Hill advised her to tell her mother that he was calling to check on band practice.

When school began in autumn of 1987, Mr. Hill began approaching Ms. Franklin. Mr. Hill surreptitiously obtained Ms. Franklin's class schedule and waited for her to emerge from her classroom after the class ended. Mr. Hill walked with Ms. Franklin throughout the school and

engaged her in conversation. Mr. Hill also sent various teachers notes to excuse Ms. Franklin from her classes. Mr. Hill excused Ms. Franklin from her third period English class, her fifth period History class, and her sixth period Geometry class so he could engage Ms. Franklin in conversation in the fieldhouse. None of these teachers asked Mr. Hill why he singled out Ms. Franklin to be excused from their classes.

In early October of 1987, Mr. Hill began making inquiries into the intimate, sexual life of Patricia Carder, a Physical Science and Special Studies student. Mr. Hill stated, "to hold on to your man, you'll have to keep him satisfied," "be sure to keep him warm," and "I bet you could do a good job keeping him warm." Mr. Hill also asked Ms. Carder if she gave her boyfriend oral sex. On Tuesday, November 3, 1987, Ms. Carder reported Mr. Hill's behavior to Wendy Larmore, a teacher, who asked Ms. Carder to keep written documentation. Ms. Carder also stated that Mr. Hill wanted to walk her to her next class.

On Friday, November 11, 1987, Mr. Hill walked Ms. Carder to class. After a male friend said "hello," Mr. Hill asked Ms. Carder if she was keeping him "satisfied." On November 13, 1987, Carder's Physical Science class went to the fieldhouse. Mr. Hill approached Ms. Carder and directed her to come into the fieldhouse and talk about her "problems." She complied. Mr. Hill went to the back of the fieldhouse while she remained in the front area. When he did not return, Ms. Carder walked out to the bleachers. As she made her way toward the bleachers, Mr. Hill asked Ms. Carder why she did not go in the back of the fieldhouse with him. On November 23, 1987, Mr. Hill walked Ms. Carder to her next class. While walking, Mr. Hill grabbed her by the neck. Ms. Carder asked him not to grab her because it "tickled." Mr. Hill replied, "since you're ticklish there, you must be ticklish in other places."

During the same month [October 1987], Ms. Jans and another student, Christine McElvaine, approached Mr. Martis seeking support for a rape crisis counseling program at the high school. After Mr. Martis asked the students whether the school needed such a program, Ms. Jans responded that rape was a frequent occurrence and even a faculty member had propositioned female students. Mr. Martis, in his statement to authorities, said:

> She went on to say that once when she was talking with Coach Hill about her relationship with her boyfriend, he had asked her what she did to take care of him. She said the conversation quickly degenerated to his [Coach Hill] asking her for oral sex [vulgarism deleted].

Mr. Martis responded with a reprimand:

> At this point, I cautioned her about the seriousness of what she was saying and asked her to be very certain about what she was saying. When I asked her if she was, in fact, making a formal charge against Coach Hill, she said she was not . . .
>
> I told her she should think seriously before repeating her remarks regarding Coach Hill unless she or her parents wanted to make a formal charge to Dr. Lewis, the Principal.

In or about October 1987, Mr. Hill personally appeared at Ms. Franklin's third period English class and excused her from that class. Lori McDonough, Ms. Franklin's third period teacher, acknowledged that approximately "midway in" through the class, Mr. Hill came to her room and asked her if he could "borrow" Ms. Franklin for a while. Ms. McDonough stated that because Ms. Franklin was a good student and because she assumed that Mr. Hill needed her to help him with something, she let Ms. Franklin go. Mr. Hill escorted Ms. Franklin to the fieldhouse, locked the door, removed Ms. Franklin's clothing, and engaged in sexual relations with her. After the act of intercourse was completed, Mr. Hill gave Ms.

Franklin a pass to return to Ms. McDonough's English class.

Ms. Franklin returned to Ms. McDonough's English class with her clothes disheveled, her hair a mess, crying, and visibly shaken and upset. While Ms. McDonough denies that Ms. Franklin ever returned to class physically shaken and upset, certain students have stated that they observed Ms. Franklin leave Ms. McDonough's English class and return visibly shaken and upset.

Approximately one (1) month later, Mr. Hill personally interrupted Ed Winn's fifth period History class and directed Ms. Franklin to accompany him to the fieldhouse. When Ms. Franklin arrived at the fieldhouse, she was worried of Mr. Hill's intentions. Sensing her reluctance to submit to his sexual desires, Mr. Hill questioned Ms. Franklin by stating, "you wouldn't want Doug [Ms. Franklin's boyfriend] to find out about us, would you?" and then stated "your mother could also find out about us." Thereafter, Mr. Hill grabbed Ms. Franklin by the lapels of her jacket, removed her clothing, and once again engaged in sexual intercourse with her. He then gave her a pass to return to Mr. Winn's fifth period History class.

Sometime after the second act of intercourse, Mr. Hill apologized to Ms. Franklin in the parking lot of the school, stating that "all he did was care" for her and that she "knew he wasn't going to hurt her." In a different conversation, Mr. Hill approached Ms. Franklin in the school hallway and told her that she had nothing to worry about because he had had a vasectomy.

Ms. Franklin asked both Mr. Winn and Ms. McDonough not to allow Mr. Hill to excuse her from their classes again.

On December 3 or 4, 1987, Wendy Larmore reported Mr. Hill's behavior toward Patricia Carder, to the female guidance counselor, Jenny Lacy. Ms. Larmore showed her the documentation Ms. Carder had compiled. Ms. Lacy counseled Ms. Carder and then called Dr. Owen, the Assistant Principal. Dr. Owen advised Ms. Lacy to take

the matter to Dr. Lewis, the Principal. Ms. Lacy and Ms. Larmore met with Dr. Lewis and explained the situation. Dr. Lewis said he would "talk" to Mr. Hill.

That evening, Dr. Owen, Joel Mannis, an Assistant Athletic Director at the school, and Mr. Hill had dinner. Mr. Mannis reported that Dr. Owen "told Mr. Hill that problems were developing regarding the fact that some female students reported that Mr. Hill was making improper remarks toward them." Dr. Owen told Mr. Hill to meet with Dr. Lewis and Ms. Lacy to confront the problem and lay it to rest. However, Mr. Hill absented himself the next two (2) school days.

Approximately two (2) weeks before Christmas 1987, Mr. Hill sent a student with a note to excuse Ms. Franklin from Mr. Winn's fifth period History class. Mr. Hill waited outside Ms. Franklin's classroom. Mr. Hill took Ms. Franklin to the press box of the school stadium, telling her it was a "safe place to talk." Once inside the press box, Mr. Hill once again removed Ms. Franklin's clothing and engaged in sexual intercourse with her.

Mr. Hill also threatened Ms. Franklin stating, "yes, those stairs look mighty steep, don't they?" Ms. Franklin was once again given a pass to return to her next period classroom.

Later, in January 1988, Ms. Jans approached Ms. Franklin and inquired about the rumors of sexual activity between Ms. Franklin and Mr. Hill. At first, Ms. Franklin declined to discuss the matter. However, Ms. Jans persisted and Ms. Franklin relented. On Monday, February 22, 1988, Ms. Franklin reported the sexual activity to Lori McDonough. Ms. McDonough eventually persuaded Ms. Franklin to tell the story to Ms. Lacy, a guidance counselor. Ms. Lacy and Ms. McDonough thereafter met with Ms. Franklin on February 23, 1988, and relayed the information to Dr. Lewis on February 29, 1988. Commencing sometime between March 2, 1988, and March 14, 1988, Dennis Foster, Director of Security, and George

Thompson, an Administrative Official from the School Board, began an investigation into the incident.

On March 14, 1988, Ms. Franklin met with Dr. Owen and reaffirmed the allegations she made against Mr. Hill. After this conversation, Ms. Franklin reported to Ms. Lacy that Dr. Prescott, the band leader, had attempted to get Ms. Franklin to drop the charges. After Mr. Foster and Mr. Thompson had begun their investigation, Dr. Prescott met with Ms. Franklin privately and told her (1) that it would be a big mess if she went through with the investigation, (2) that Mr. Hill's name would be in the newspapers and on the 6:00 p.m. news, (3) that the school would look bad, and (4) that she would look bad. Dr. Prescott stated that "no one would gain from reporting the incident." Dr. Prescott also attempted to persuade Ms. Franklin's boyfriend to speak to Ms. Franklin about dropping the charges because it was a "no win" situation.

During the course of the school's investigation, Dennis Foster, the investigator, advised Ms. Franklin's parents that he believed she was telling the truth. Mr. Foster's final memorandum to Jim Steele, dated April 1, 1988, made ten (10) points concerning the incident:

1. Christine Franklin, when questioned about birth control, did not know the word until Dr. Lewis stated it and she immediately said "that's the word." When Coach Andy Hill was questioned about it, he had the remarkable memory, of an incidental conversation that took place six months ago, to say that she had knowledge of it because one day out in the parking lot, while talking with Christine, she asked him why he was absent the previous day. Coach Andy Hill stated that he told her that he had had a male operation. Coach

Andy Hill stated that Christine immediately said "oh, you had a vasectomy." The girl didn't know the word when questioned by us.

2. Coach Andy Hill was told by Dr. Lewis, the first time we talked to him, to stay away from her. That same day, Coach Andy Hill approached Christine and told her to drop the case.
3. Coach Andy Hill told us, in the second conversation we had with him, that if he had sex with the girl, surely she would have noticed a surgical scar on the left side of his body. We never mentioned this to Christine [about the scar]. In her statement, she mentioned that she had noticed a scar on his abdomen.
4. Christine is determined, as are her parents, to take a polygraph. Coach Andy Hill is adamant to not take one. He even stated that his lawyer told him that it would be a good idea if the girl did not take one. To me, this is peculiar, for his lawyer to advise the girl not to take one.
5. The girl was very descriptive in describing the interior of the press box. She stated that she had never been in it before. We verified this with Dr. Prescott, that students were not allowed in the press box, while he was directing them on the field. He stated that it is highly unlikely that she could even get near the press box, because she was in the band, on the field.
6. Coach Andy Hill stated that he lied on a note that he gave another teacher to get Christine into class late, stating that she was helping him look for a football

jersey. He finally stated that he was "counseling" her.

7. All three of the girls that are making accusations against Coach Andy Hill are of weak character – possibly victimized because of their character and lack of credibility.

8. After being told by Dr. Owen to go and report to Dr. Lewis, about these allegations, Coach Andy Hill never did.

9. Coach Andy Hill's story of what happened between the confrontation between himself and Christine, and Doug Kreeft, differs from Doug's and Christine's story.

10. Coach Andy Hill called Christine, at her house, over the summer, and according to him, he called her back to check on band practice. Christine Franklin has an unlisted number and her version of the story differs from that of Coach Andy Hill. Opinion: Coach Andy Hill could have gotten the band practice schedule from Dr. Prescott.

On April 14, 1988, Mr. Hill tendered a handwritten letter resigning from Gwinnett County Public Schools.

REASONS FOR ALLOWANCE OF THE WRIT

I. INTRODUCTION – THERE IS A SPLIT OF AUTHORITY BETWEEN THE ELEVENTH CIRCUIT AND THE THIRD CIRCUIT AS TO WHETHER COMPENSATORY DAMAGES ARE AVAILABLE FOR INTENTIONAL DISCRIMINATION UNDER TITLE IX OF THE EDUCATION AMENDMENTS ACT.

Ms. Franklin contends that compensatory damages are allowed as a remedy for intentional discrimination under the Education Amendments of 1972. In support of this contention, Ms. Franklin argues that the Supreme

Court of the United States opinion in *Guardians Ass'n v. Civil Service Commission of the City of New York*, 463 U.S. 582 (1983), provides the basis for such compensatory damages.

While the Eleventh Circuit in *Franklin v. Gwinnett County Schools*, 911 F.2d 617 (11th Cir. 1990), held that *Guardians* had not expressly overruled the Fifth Circuit precedent of *Drayden v. Needville Indep. School Dist.*, 642 F.2d 129 (5th Cir. 1981), which held that Title IX relief is limited to cessation of discriminatory activity, it did recognize that *Guardians* provided no clear majority on the issue of whether compensatory relief is available under Title IX for acts of intentional discrimination. In fact, the Eleventh Circuit recognized that *Guardians* was a fragmented decision which left open the question of whether compensatory damages for intentional discrimination may be sought. Additionally, Judge Johnson noted in his concurrence that until the Supreme Court or an *en banc* court says otherwise, *Drayden* is the law of the Eleventh Circuit. *Franklin, supra.* at 623.

However, the Third Circuit Court of Appeals held that compensatory damages are available under Title IX for intentional acts of discrimination. *See, Pfeiffer v. Marion Center Area School District, Board of School Directors for the Marion Center Area School District, et al.*, 1990 W.L. 163389 (3rd Cir. 1990).

For these reasons, the Petitioner asserts that the Eleventh Circuit Court of Appeals and the Third Circuit Court of Appeals are in direct conflict as to whether compensatory damages are available under Title IX for intentional discrimination and that the Supreme Court of the United States should settle the issue.

II. THE SUPREME COURT'S OPINION IN *GUARDIANS ASS'N v. CIVIL SERVICE COMMISSION* ESTABLISHES THAT VICTIMS OF INTENTIONAL DISCRIMINATION CAN RECOVER COMPENSATORY RELIEF UNDER TITLE IX OF THE EDUCATION AMENDMENTS OF 1972.

Ms. Franklin contends that victims of intentional discrimination can recover compensatory damages under

Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681.[1] Franklin's position is supported by Justice White's opinion in *Guardians Ass'n Civil Service Commission of the City of New York*, 463 U.S. 582 (1983),[2] the legislative history of Title IX, and the Third Circuit's decision in *Pfeiffer v. Marion Center Area School District, Board of School Directors for the Marion Center Area School District, et al.*, 1990 W.L. 163389 (3rd Cir. 1990). *Pfeiffer* held that compensatory damages are available for intentional violations of Title IX. In the case at bar, the Eleventh Circuit held that *Drayden v. Needville Indep. School Dist.*, 642 F.2d 129 (5th Cir., Unit A, April 1981), was dispositive of the issue. In so holding, the Eleventh Circuit recognized that *Guardians* was a fragmented opinion where three (3) members of the court concluded that the issue of compensatory damages was open and four (4) justices believed relief was available. It is because of this split of authority that this Writ of Certiorari should be granted.

In *Guardians*, black and Hispanic policemen sued the City of New York, challenging entry level examinations for police officers. Although the District Court found no

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[1] Title IX provides in relevant part that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . " 20 U.S.C. § 1871(a) (1988).

[2] The language of Title IX tracks that of Title VI of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 252 (codified at 42 U.S.C. § 2000d to 2000d-7 (1982), as does the Rehabilitation Act, 29 U.S.C. § 794 (§ 504) and the Age Discrimination Act, 42 U.S.C. § 6101, *et seq. See, U.S. Dept. of Trans. v. Paralyzed Veterans of America*, 477 U.S. 597, 600 n. 4 (1986); *Cannon v. University of Chicago*, 441 U.S. 677, 694-696 (1979); *Consolidated Rail Corp. v. Darrone*, 465 U.S. 624, 630-631 (1984). Since Title IX is for the most part interchangeable with Title VI, Ms. Franklin will cite cases interchangeably in this petition. *See also, Franklin v. Gwinnett County Public Schools*, 911 F.2d 617 (1990) (the same analysis should apply to both statutes).

evidence of discriminatory intent, it did find the examinations had a discriminatory impact on black and Hispanic applicants. Based upon the finding, the court awarded the plaintiffs compensatory relief under Title VI. The United States Court of Appeals for the Second Circuit reversed the judgment of the District Court, holding that proof of discriminatory intent was a requirement of Title VI.

The Supreme Court affirmed that judgment of the Second Circuit, but for different reasons. Five (5) Justices of the Supreme Court held that proof of discriminatory intent was not a requirement for establishing a cause of action under Title VI, but that compensatory relief was unavailable for victims of unintentional discrimination. (*See, Guardians*, 463 U.S. at 606-07, 103 S.Ct. at 3234-35, (White, J., announcing judgment of the court, joined by Rehnquist, J.); *Id.* at 610-11, 103 S.Ct. at 3236-37 (Powell, J., concurring, joined by Burger, C. J., and Rehnquist, J.); *Id* at 615, 103 S.Ct. at 3239 (O'Conner, J., concurring). They based this conclusion on the general rule that remedies to enforce spending clause statutes must "respect the privilege of the recipient of federal funds to withdraw and terminate its receipt of federal money rather than assume the further obligations and duties that a court has determined are necessary for compliance." *Guardians*, 463 U.S. at 597, *citing Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 101 S.Ct. 1531, 67 L.Ed.2d 694 (1981). *See also, Rosado v. Wyman*, 397 U.S. 397, 90 S.Ct. 1207, 25 L.Ed.2d (1970).

Justice White, joined by five (5) other members of the Supreme Court, would reach a different result if the plaintiff proved intentional discrimination:

> Because it was found that there was no proof of intentional discrimination by respondents, I put aside for present purposes those situations involving a private plaintiff who is entitled to benefits of a federal program but has been intentionally discriminated against by the administrators of the program. In cases where

> intentional discrimination has been shown, there can be no question as to what the recipient's obligation under the program was and no question that the recipient was aware of that obligation. In such situations, it may be that the victim of the intentional discrimination should be entitled to a compensatory award, as well as prospective relief in the event the State continues with the program.

Guardians, 463 U.S. 597.[3]

In the instant case, Respondent, in seeking dismissal of the action at the District Court level, attacked the decision in *Guardians* and cited former Fifth Circuit precedent in *Drayden v. Needville Indep. School Dist.*, 642 F.2d 129 (5th Cir. 1981), as authority for its argument that Title IX relief was limited to cessation of the discriminatory activity. Respondent also relied upon Seventh Circuit decisions in *Lieberman v. University of Chicago*, 660 F.2d 1185 (7th Cir. 1981), and *Cannon v. University of Health Sciences*, 710 F.2d 351 (7th Cir. 1983).[4]

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[3] Several decisions have interpreted *Guardians* as authorizing compensatory damages for intentional violations of the affected statutes. *See, Pfeiffer, supra*, (3rd Circuit Court of Appeals. *See Beehler v. Jeffes*, 664 F. Supp. 931 (M.D. Pa. 1986); *Wilder v. City of New York*, 568 F. Supp. 1132, 1135 (E.D.N.Y. 1983); *Storey v. Board of Regents of Univ. of Wis. System*, 604 F. Supp. 1200, 1202 n. 3 (W.D. Wis. 1985); *Manecke v. School Bd. of Pinellas County*, 762 F.2d 912, 922 n. 8 (11th Cir. 1985); *Carter v. Orleans Parish Public Schools*, 725 F.2d 261, 264 (5th Cir. 1984); *Marvin H. v. Austin Indep. School Dist.*, 714 F.2d 1348, 1357 (5th Cir. 1983); *Sabo v. O'Bannon*, 586 F. Supp. 1132, 1138 (E.D. Pa. 1984); *Araujo v. Trustees of Boston College*, 34 Empl. Prac. Dec. (CCH) ¶ 34,409 (D. Mass. Dec. 16, 1983); *Organization of Minority Vendors, Inc. v. Ill. Cent. Gulf R.R.*, 579 F. Supp. 574, 594-595, n. 10 (N.D. Ill. 1983).

[4] These particular cases will be collectively referred to as *Lieberman* to avoid confusion with *Cannon v. University of Chicago*, 441 U.S. 677 (1979).

The District Court below relied upon *Drayden*, and stated that "[a]bsent some clear authority modifying or limiting *Drayden*, this court declines to enlarge on the existing remedies available under Title IX." *See*, Appendix B. The District Court and the Eleventh Circuit's conclusion that compensatory damages would be an expansion of existing remedies is inaccurate. *Guardians* did not involve intentional discrimination and in fact, the Eleventh Circuit has expressly left this issue open for the Supreme Court of the United States to decide. Ms. Franklin also shows this Court that the Seventh Circuit's opinion in *Lieberman* is no longer valid in view of new precedent. *See, Craft v. Board of Trustees of University of Illinois*, 793 F.2d 140 (7th Cir. 1986).

In *Drayden*, black female school teachers filed an action against their employer alleging violations of 42 U.S.C §§ 1981, 1985, and 1986. After the then-Department of Health, Education and Welfare determined that the school Board had not complied with Title VI of the Civil Rights Act of 1964, the teachers amended their complaint seeking damages, declaratory, and injunctive relief. The District Court dismissed the action and the former Fifth Circuit affirmed, stating that the only relief allowed under Title VI is cessation of the discriminatory activity.

Drayden has limited or no precedential value. Since 1981, when the opinion was issued, the Supreme Court has issued its opinions in *Guardians, supra*, and *Consolidated Rail Corporation v. Darrone*, 465 U.S. 624 (1984), and the Eleventh Circuit Court of Appeals has understood the issue of damages to be an open question. *See, Powell v. Defore*, 699 F.2d 1078 (11th Cir. 1983); *Manecke v. School Bd. of Pinellas County*, 762 F.2d 912 (11th Cir. 1985); and *Franklin v. Gwinnett County Public Schools*, 911 F.2d 617, 621 (1990). More recently, the Third Circuit Court of Appeals issued its holding in *Pfeiffer, supra*.

In *Pfeiffer v. Marion Center Area School District, Board of School Directors for the Marion Center Area School District, et al., supra,* the United States Court of Appeals for the Third Circuit, in ruling on an appeal from the United States District Court for the Western District of Pennsylvania, held that compensatory damages are available for intentional violations of Title IX. In this case, the court was faced squarely with the issue of whether compensatory damages are available under Title IX. However, in *Franklin, supra,* the Eleventh Circuit held that compensatory damages were unavailable.

The facts of *Pfeiffer* are noteworthy. Arlene Pfeiffer was a member of the Class of 1984 at Marion Center High School in Marion, Indiana County, Pennsylvania. She was a good student who earned high grades and participated in a wide variety of school organizations, including serving as President of the Student Council. Based on her record, she was elected to her high school's chapter of the National Honor Society ("NHS") in 1981. *Id.* This chapter was governed by a faculty council composed of Robert L. Stewart, the Principal of the high school, Thetta Lightcap, Jane Smith, Judith Scubis, and George Krivonick, all teachers of the Marion Center High School.

During the spring of 1983, Pfeiffer, who was unmarried, discovered that she was pregnant. She informed her school guidance counselor and principal and indicated that she wanted to rear her child but that she also wanted to finish high school. Principal Stewart informed her that he saw no problem in her plan to continue school and graduate. *Id.*

Upon learning of Pfeiffer's pregnancy, Judith Scubis, a teacher and member of the faculty council, brought the matter to the attention of the other council members of the NHS in the spring of 1983. *Id.* That fall, when school resumed, the council scheduled a meeting for November 4, 1983, which Pfeiffer was invited to attend. At this time, the council members explained to her that her NHS membership was in question because premarital sex appeared

to be contrary to the qualities of leadership and character essential for membership. *Id.*

On November 8, 1983, Pfeiffer's father, Delmont Pfeiffer, telephoned Principal Stewart requesting a prompt decision because an induction ceremony for seniors was scheduled for the next day and Arlene wanted to attend. *Id.* Council met in the morning of November 9, 1983, and by secret ballot unanimously voted to dismiss her from the NHS chapter. *Id.*

On November 30, 1983, the council met with Pfeiffer's parents, who requested that the subject be placed on the agenda of the School Board's meeting scheduled for December 12, 1983. Pfeiffer and her parents appeared at the meeting with council and at the discussion, the Board was asked to review the decision of the faculty council. On December 19, 1983, the Board and the council met to consider the matter further and on January 16, 1984, the School Board adopted a resolution unanimously confirming the action of the faculty council.

Pfeiffer filed suit alleging discrimination in her dismissal from the local chapter of the NHS seeking an injunction, that she be reinstated in the chapter, that the records of the school district be corrected to show that she remained in good standing in the Society, that a procedure for dismissal be ordered that is not discriminatory, that the NHS be prohibited from disseminating information about her dismissal, and that she be awarded compensatory and punitive damages. Injunctive relief and damages were requested under Title IX of the Education Amendments of 1972 and its implementing regulations. *Id.*

The Court of Appeals for the Third Circuit, after ruling that Title IX was applicable, held that compensatory damages are available under Title IX of the Education Amendments Act, a holding directly contrary to that

of the Court of Appeals for the Eleventh Circuit in *Franklin* upon which this petition is based. In holding that compensatory damages under Title IX were available, the court cited *Guardians Ass'n* for the proposition that a majority of the court found that compensatory relief based on past violations of conditions regulating use of Federal funds is available for Title VI violations when intentional discrimination is present. *Id.* Tracking the analysis in the five (5) opinions in *Guardians*, the court concluded "not without some difficulty, that compensatory relief is available for certain Title IX violations and that this [case] is one of them." Furthermore, the court recognized that

> [O]ur decision here puts us in conflict with the Courts of Appeals of both the Seventh and Eleventh Circuits. *See, Franklin v. Gwinnett County Public Schools*, 911 F.2d 617 (11th Cir. 1990) (compensatory damages are not recoverable under either Title VI or Title IX based on Fifth Circuit precedent); *Cannon v. University of Health Science/The Chicago Medical School*, 710 F.2d 351 (7th Cir. 1983) (case law precluded claim for damages under Title IX); *Lieberman v. University of Chicago*, 660 F.2d 1185 (7th Cir. 1981) (damages unavailable under Title IX), *cert. denied*, 456 U.S. 937 (1982). However, we believe that it is to the Supreme Court that we must look for guidance, and our reading of *Guardian Ass'n, supra*, and its prodigeny, persuades us that Title IX includes a remedy of compensatory damages. In so doing, we follow the analysis of Judge Lord in *Haffer v. Temple University*, 678 F. Supp. 517 (E.D. Pa. 1987), and Chief Judge Nealon in *Beehler v. Jeffes*, 664 F. Supp. 931 (M.D. Pa. 1986).

Id.

For each of the aforementioned reasons, especially the split of authority between the Eleventh Circuit and the Third Circuit, this petition for writ of certiorari should be granted.

III. A COMPENSATORY DAMAGES REMEDY IS NECESSARY TO ENFORCE FOURTEENTH AMENDMENT RIGHTS UNDER THE EDUCATION AMENDMENTS OF 1972

The Court of Appeals for the Eleventh Circuit relied for its determination that damages are not available under Title IX, in substantial part, on the view that Title IX is spending power legislation and private remedies, unless expressly provided by Congress, should be limited. *See, Franklin*, 911 F.2d at 621. Justice Harlan, in its concurring opinion in *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1970), stated that "[I]n suits for damages based on violations of federal statutes lacking any express authorization of a damage remedy, this Court has authorized such relief where, in its view, damages are necessary to effectuate the Congressional policy underpinning the substantive provisions of the statute." Therefore, the proper test is "whether compensatory relief is 'necessary' or 'appropriate' to the vindication of the interest asserted." *Id.* at 407. The first step in such an inquiry then is to determine the nature of the interest asserted. Respondent would urge this Court that Title IX is simply "spending clause" legislation, and that Ms. Franklin has no interest to be vindicated. Petitioner, on the other hand, contends that Congress intended to protect important Fourteenth Amendment rights through the statute.

This Court has previously indicated that one of the purposes of the Education Amendments was to protect Fourteenth Amendment rights. In *Cannon v. Univ. of Chicago*, 441 U.S. 677 (1979), the Court stated that the purpose of the statute was twofold: "[F]irst, to avoid the issue of federal resources to support discriminatory practices. The second purpose of the statute was to provide individual citizens effective protection against discrimination." *Id.* at 704. Petitioner adopts that portion of the amicus brief of the National Women's Law Center filed in the Eleventh Circuit (attached hereto as Appendix "D"),

which demonstrates that Title IX "unmistakably bears the imprint of the Fourteenth Amendment . . . . " *See* Brief of Amicus, page 17. Title IX is not simply "spending clause" legislation, as Respondent would argue.

If Congress did not utilize its power under the Fourteenth Amendment, then it surely would not have been necessary to specifically invoke Section 5 of the Amendment to abrogate the states' Eleventh Amendment immunity for violations of the statute. S. Rep. No. 388, 99th Cong. 2d Sess. 27 (1986). Similarly, Congress passed the Civil Rights Attorneys Fees Awards Act of 1976 specifically under the authority of the Fourteenth Amendment. S. Rep. No. 1011, 94th Cong., 2d Sess. 5, *reprinted in* 1976 U.S. Code Cong. & Admin. News 5913. The Fourteenth Amendment connection is firmly established and a damages remedy is necessary to vindicate rights guaranteed by the Amendment.

In determining whether damages relief is necessary to protect interests under a statute, this Court should look to six factors. (1) the nature of the interest protected and the absence of contrary legislative intent; (2) the seriousness of the injury to the particular plaintiff; (3) the extent to which the harm threatens others similarly situated; (4) the extent to which workable standards of adjudication can be formulated; (5) the social interest in permitting the conduct complained of, and (6) the burden imposed by judicial intervention in similar cases in the future. *See, J.I. Case Co. v. Borak*, 377 U.S. 426 (1964); Katz, *The Jurisprudence of Remedies: Constitutional Legality and the Law of Torts in Bell v. Hood*, 117 U. Pa. L. Rev. 1 (1968).

In the first instance, the protections of the Fourteenth Amendment are clearly important rights which have been recognized by this Court on numerous occasions, particularly where the interests of children are concerned. *See, e.g., Taylor v. Ledbetter*, 812 F.2d 298 (11th Cir. 1987). The protections of the Fourteenth Amendment given to women in employment pursuant to Title VII of the Civil Rights Act of 1964 should not be less than the protection

given to women under the Education Amendments of 1972. If these protections were not afforded women in this instance, than a 15 or 16 year-old high school student would be entitled to less protection from invidious sexual discrimination, including sexual harassment, than a 30 year-old office worker, also victimized by sexual harassment.

The protections offered by Title IX should be greater than those offered by Title VII. A school board which accepts federal funds under Title IX voluntarily gives its assurance that it will not discriminate as a condition for receipt of those funds. A business subject to the proscriptions of Title VII makes no such agreement and receives no funds; the prohibitions of the statute are simply imposed upon it. The school board that thereafter engages in intentional discrimination is more culpable because it specifically gave its assurance that it would not do so.

Under the second criteria, Petitioner stands to suffer much harm from the discriminatory actions of Respondent. The Eleventh Circuit has extensively reviewed the problems of sexual harassment in employment. *Henson v. City of Dundee*, 682 F.2d 897 (11th Cir. 1982). The problems of sexual harassment in education are even greater. The teacher-student relationship is, in a sense, a fiduciary relationship involving trust and dependency not often found in the employment context. Schneider, *Sexual Harassment and Higher Education*, 65 U. Cin. L. Rev. 525, n.19 (1987). Moreover, the harms of sexual harassment are greater and the student more vulnerable to reprisals, such as lowered grades, denied recommendations, etc. In an employment context, it is easier to resign and supervisors, unlike teachers, do not enjoy the cloak of academic freedom.

Third, the problem of sexual discrimination, and particularly sexual harassment, is extensive, not only in colleges, but in secondary schools as well. *See, Stoneking v. Bradford Area School District*, No. 87-3637, slip op. (3d Cir.

Sept. 12, 1988). In *Stoneking*, a popular band leader, through physical force, threats of reprisals, intimidation and coercion, sexually abused and harassed various female band members. His conduct included forcing one female to engage in various sexual acts with him in diverse places, including the school. School administrators knew that the band leader had engaged in the sexual harassment of various females, but failed to take action.

A teacher at a Rockdale County, Georgia school, was convicted of charges that he fondled female students. Two disinterested females purportedly testified at his trial under oath, that they had reported this teacher's sexual abuse two years before he was accused to the school principal, who did nothing. A civil action entitled *McDonald, et al. v. Jenette, The Rockdale County School District and the Rockdale County Board of Education*, 1:89-CV-1049-ODE, has been brought under Title IX in the Northern District of Georgia. The rights of similarly-situated students need protection.

Fourth, there are workable standards of adjudication for damages in cases of sexual discrimination and harassment. In *Carey v. Pipus*, 435 U.S. 247 (1978), high school students filed an action seeking damages for being denied procedural due process rights after being suspended from school. The Court denied relief, stating that there must be evidence of an injury. In making that determination, the Court stated:

> We foresee no particular difficulty in producing evidence that mental and emotional distress was caused by the denial of procedural due process itself. Distress is a personal injury familiar to the law, customarily proved by showing the nature and circumstances of the wrong and its effect on the plaintiff.

Carey, 435 U.S. at 263. In a footnote, the Court added:

> We use the term 'distress' to include mental suffering or emotional anguish. Although essentially subjective, genuine injury in this respect may be evidenced by one's conduct and

> observed by others. Juries must be guided by appropriate instructions, and an award of damages must be supported by competent evidence concerning the injury. (Citation omitted.)

Workable standards for proving an injury can be formulated, and already are in effect. Courts do so every day in Section 1983 actions. *See, e.g., Dykes v. Hoseman*, 743 F.2d 1488, 1500 (11th Cir. 1984); *Vanelli v. Reynolds School Dist. No. 7*, 667 F.2d 773 (9th Cir. 1982); *Nekolny v. Painter*, 653 F.2d 1164 (7th Cir. 1981); *Jones v. City of Key West*, 679 F. Supp. 1547 (S.D. Fla. 1988).

The fifth criteria for determining whether a damages remedy is appropriate also militates in favor of the Petitioner's case. There is absolutely no social utility whatsoever in allowing the conduct that is the subject matter of the suit.

The sixth criteria is the burden of judicial intervention in similar cases. Respondent argued that "[P]laintiff's remedies are protected by state law," and "[M]onetary relief is available elsewhere." They contended, as a matter of policy, that educational institutions would be subject to liability. But, this is the policy issue already decided by Congress when they enacted the Civil Rights Remedies Equalization Amendment. S. Rep. No. 388, 99th Cong. 2d Sess. 27 (1986). The Senate Report, which is attached as an appendix to the Brief of the Amici in this case, clearly shows Congress evaluated this policy argument and rejected Respondent's position:

> Section 1003 also explicitly provides that in a suit against a State for a violation of any of these statute remedies, *including monetary damages*, are available to the same extent as they would be available for such a violation in a suit against any public or private entity other than a State.

Id. at 28 (emphasis added). It would be disingenuous for Respondent to argue that they would experience liability problems when Congress resolved that issue. If Respondent thinks that accepting responsibility for its actions

and complying with government rules against discrimination is too large a price to pay for federal assistance, then they can refuse the aid. As Justice White stated in *Guardians*, "[T]here can be no question as to what the recipient's obligation under the program was and no question [that] the recipient was aware of that obligation." 463 U.S. at 598.

In summary, all of the six criteria for determining whether compensatory relief should be granted fall squarely in favor of Petitioner and against Respondent. Evaluation of the six criteria conclusively answers the question of whether damages are necessary to effectuate the purposes of the statute in the affirmative. While the Eleventh Circuit ruled that they must proceed with extreme care when . . . asked to find a right to compensatory relief, where Congress has not expressly provided such a remedy, it is clear that damages are an appropriate remedy for an institution that gives its word to the United States government that it will not discriminate on the basis of gender and then does it anyway.[5] Therefore, this Court should grant this writ on this issue as well.

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[5] An investigation by the majority staff of the Committee on Education in Labor in the U.S. House of Representatives found that the agency has not vigorously enforced laws protecting the rights of women and minorities in Education. Staff of H.R. Comm. on Education and Labor, 100th Cong. 2d Sess., *Report on the Investigation of the Civil Rights Enforcement Activities of the Office for Civil Rights, U.S. Dept. of Education*. (Comm. Print 1988). Indeed, the majority of complaint investigations were closed with findings of "no violation." With regard to investigations regarding handicap and gender discrimination, OCR (Office for Civil Rights, U.S. Department of Education) procedure seems to be to close the file with a finding of "violation corrected," which is precisely what happened in the instant case. This investigation revealed that OCR staff had, among other things, encouraged complaints to withdraw complaints to decrease work load and refrained from handling issues considered "off limits."

IV. CONCLUSION.

For the foregoing reasons, the Court should grant this Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX A

FRANKLIN v. GWINNETT COUNTY PUBLIC SCHOOLS

Christine FRANKLIN,
Plaintiff-Appellant,

v.

The GWINNETT COUNTY PUBLIC SCHOOLS, a Local Education Agency (LEA), Dr. William Prescott, An Individual,
Defendants-Appellees.

No. 89-8393.

United States Court of Appeals,
Eleventh Circuit.

Sept. 10, 1990.

Appeal from the United States District Court for the Northern District of Georgia.

Before JOHNSON, Circuit judge, HILL* and HENLEY**, Senior Circuit Judges.

HENLEY, Senior Circuit Judge.

Christine Franklin appeals from the district court's[1] dismissal of her action pursuant to Federal Rule of Civil Procedure 12(b)(6), for failure to state a claim upon which relief can be granted.[2] We affirm.

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* *See* Rule 34-2(b), Rules of the U.S. Court of Appeals for the Eleventh Circuit.

** Honorable J. Smith Henley, Senior U.S. Circuit Judge for the Eighth Circuit, sitting by designation.

[1] The Honorable Orinda D. Evans, United States District Judge, Northern District of Georgia.

[2] In support of Franklin, the National Women's Law Center submitted a brief on behalf of numerous interested parties;

(Continued on following page)

Franklin brought the action under Title IX of the Education Amendments of 1972 (codified as amended at 20 U.S.C. §§ 1681-1688 (1988)) ("Title IX"), seeking damages against Gwinnett County Public Schools ("Gwinnett"), and Dr. William Prescott, contending that she had been intentionally discriminated against because of her gender. Gwinnett filed a motion to dismiss, arguing, *inter alia*, that compensatory relief is unavailable for violations of Title IX of the Education Amendments of 1972.

According to her complaint, Franklin attended North Gwinnett High School, Gwinnett County Public School District, in the State of Georgia. In September of 1986, Coach Andrew Hill, Franklin's economics teacher, became friends with her. Indications of this friendship included Franklin being allowed to grade class papers, private meetings between her and Hill during and between classes, notes written by Hill authorizing her late admittance to other classes, and private visits by her and Hill to Hill's office, which was separated from the main school building.

According to the complaint, during this period of time Hill initiated with Franklin discussions of a sexual nature. Dr. William Prescott, band director at the school, was told by Douglas Kreeft, Franklin's boyfriend, about these discussions. Franklin was excused from several classes at the request of Hill. At one point after an argument in the school parking lot, Hill grabbed Franklin and

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in support of Gwinnett, the Georgia School Boards Association and the Alabama Association of School Boards have submitted amicus briefs.

kissed her. In October of 1987, an assistant principal was told by other students of "involvement" between Hill and Franklin. The student was "admonished." During this period of time, certain female students indicated to teachers and a guidance counsellor [sic] at the school that Hill was directing sexual remarks at other female students as well.

Ultimately, according to the complaint, Hill and Franklin engaged in two or three episodes of sexual intercourse on school grounds between October and December of 1987. On February 29, 1988, the school's principal was informed of the alleged sexual activity between Hill and Franklin.

Franklin alleged that after she reported the above circumstances to school authorities Prescott tried to discourage her from pursuing the matter by talking to her about the negative publicity which could result. Prescott also spoke to Kreeft in an effort to enlist his assistance to discourage Franklin from pursuing the matter. Sometime between March 2 and March 14, 1988, Gwinnett began an investigation. At the termination of the 1987-88 school year, Hill resigned and Prescott retired. At this point, Gwinnett closed its investigation.

In August of 1988, Franklin filed a complaint against Gwinnett with the Office of Civil Rights ("OCR"), United States Department of Education, alleging that she had been subjected to sexual discrimination in violation of Title IX.[3] Following a six-month investigation, OCR found

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[3] The Department is charged with promulgating and enforcing regulations pursuant to Title IX. *See* 34 C.F.R. §§ 106.1-106.71 (1989).

Gwinnett in violation of Title IX.[4] However in a December 14, 1988 letter signed by its regional director and addressed to Franklin's counsel OCR stated that due to assurances of affirmative actions designed to prevent any future violations it considered Gwinnett as of that date in compliance with Title IX. Therefore, the OCR investigation was closed.

In the context of a motion to dismiss, we accept as true facts alleged in a complaint and construe them in a light favorable to the plaintiff. *E.G., Quality Foods de Centro Am., S.A. v. Latin Am. Agribusiness Dev. Corp.*, 711 F.2d 989, 994-95 (11th Cir.1983). The parties agree and cases have held that Title VI of Civil Rights Act of 1964 (codified as amended at 42 U.S.C. §§ 2000d to d-4 (1988)) ("Title VI"),[5] served as the legislative antecedent for Title IX,[6] and that consequently, the jurisprudential analysis of

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[4] Specifically, Gwinnett was found in violation of 34 C.F.R. §§ 106.8, .31(a), .31(b)(2), .31(b)(4), .31(b)(7), .71 (1989).

[5] Section 601 of Title VI provides the following:

> No person in the United State shall, on the basis of race, color, or national origin, be excluded from participation in, be denied the benefits of, or by subjected to discrimination under any program or activity receiving Federal financial assistance.

Pub.L.No. 88-352, tit. VI, § 601, 78 Stat. 252 (1964) (codified at 42 U.S.C. § 2000d (1988)).

[6] Section 901(a) of Title IX provides the following:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination

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the Justices' opinions in *Guardians Association v. Civil Service Commission*, 463 U.S. 582, 103 S.Ct. 3221, 77 L.Ed.2d 866 (1983), which construed Title VI (and upon which both parties rely), as well as the analysis of other Title VI cases, is applicable in a Title IX context. *See Cannon v. University of Chicago*, 441 U.S. 677, 99 S.Ct. 1946, 60 L.Ed.2d 560 (1979).

> Title IX was patterned after Title VI of the Civil Rights Act of 1964. Except for the substitution of the word "sex" in Title IX to replace the words "race, color, or national origin" in Title VI, the two statutes use identical language to describe the benefitted class. Both statutes provide the same administrative mechanism for terminating federal financial support for institutions engaged in prohibited discrimination.

Id. at 694-96, 99 S.Ct. at 1956-57. Hereinafter we discuss Title VI and Title IX cases somewhat interchangeably, because we believe it is settled that analysis of the Two statutes is substantially the same.

For purposes of this case, it is undisputed that an implied private right of action exists under Title IX. *See Cannon*, 441 U.S. 677, 99 S.Ct. 1946. However, it is clear that the question "whether a litigant has a 'cause of action' is analytically distinct and prior to the question of what relief, if any, a litigant may be entitled to receive."

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> under any education program or activity receiving Federal financial assistance.

Pub.L.No. 92-318, § 901(a), 86 Stat. 373 (1972) (codified at 20 U.S.C. § 1681(a)(1988)).

Davis v. Passman, 442 U.S. 228, 239, 99 S.Ct. 2264, 2274, 60 L.Ed.2d 846 (1979). Consequently, the existence of a cause of action by no means assures a right to an unlimited array of remedies.

In *Drayden v. Needville Indep. School Dist.*, 642 F.2d 129 (5th Cir.Unit A April 1981), discharged black teachers filed suit under Title VI and other civil rights statutes alleging civil rights violations against a school district for which they had worked, seeking declaratory and injunctive relief and damages. In affirming the dismissal of the action, the court held that the "private right of action allowed under Title VI encompasses *no more* than an attempt to have any discriminatory activity ceased." *Id* at 133 (emphasis added); *see also Lieberman v. University of Chicago*, 660 F.2d 1185, 1188 (7th Cir.1981) (affirming summary judgment against plaintiff who sought damages under Title IX for discriminatory medical school admissions policies, noting that it is for Congress, not the courts, to create a right to damages), *cert. denied*, 463 U.S. 602, 102 S.Ct. 1993, 72 L.Ed.2d 456 (1982).

Since decisions of the former Fifth Circuit rendered prior to October 1, 1981 represent binding precedent for this court, *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir.1981) (en banc), we find it clear that *Drayden* constituted this circuit's view on the matter of compensatory damages under Titles VI and IX prior to *Guardians Association*, a case to which we now turn.

In *Guardians Association*, petitioners black and Hispanic police officers of the City of New York, brought a class action lawsuit against the Civil Service Commission alleging their layoffs constituted civil rights violations

under, *inter alia*, Title VI. The district court awarded constructive seniority, with monetary and nonmonetary entitlements, and certain other relief. The court of appeals reversed on the issue of damages, holding that intentional discrimination – which had not been found by the trial court – was required for relief under Title VI.

A fragmented Supreme Court affirmed the judgment of the court of appeals. A fair reading of the various opinions discloses that a majority of Justices agreed that discriminatory intent is not a prerequisite to relief under Title VI, *see Guardians Association*, 463 U.S. at 584 & n. 2, 103 S.Ct. at 3223 & n. 2 (opinion of White, J.), but that "at least five justices would not allow *compensatory* relief to a private plaintiff under Title VI absent proof of discriminatory intent." *Manecke v. School Bd. of Pinellas County, Fla.*, 762 F.2d 912, 922, n. 8 (11th Cir.1985), *cert. denied*, 474 U.S. 1062, 106 S.Ct. 809, 88 L.Ed.2d 784 (1986).

At the outset, we concede some difficulty in application of *Guardians Association* to the instant dispute, given the various opinions therein. In this regard, we note the comments of Justice Powell that the Court's several "opinions [in *Guardians Association*] . . . will further confuse rather than guide." 463 U.S. at 608, 103 S.Ct. at 3235. And though *Guardians Association* has been described as "a badly fragmented decision," *see id.*, we nevertheless have looked to if for guidance.

In announcing the judgment of the *Guardians Association Court*, Justice White concocted an opinion which only Justice Rehnquist joined. Noting that there had been no showing of intentional discrimination, Justice White "put

aside" the question of damages in hypothetical circumstances involving intentional discrimination. 463 U.S. at 597, 103 S.Ct. at 3229. Justice White added, however, that "it *may* be that the victim of the intentional discrimination should be entitled to a compensatory award. . . . " *Id.* (emphasis added).

Justice Powell, joined by Chief Justice Burger, found no implied cause of action *at all* under Title VI. *See id.* at 608-11, 103 S.Ct. at 3235-37 (Powell, J., concurring in judgment). It follows logically that the Justices did not believe damages could be sought, where no cause of action could lie in the first place. Finally, Justice O'Connor also concurred in judgment, concluding that no relief of any kind was available without intentional discrimination. She therefore did not reach the issue of whether a private cause of action for damages would lie. *See id.* at 612 n. 1, 103 S.Ct. at 3238 n. 1 (O'Connor, J., concurring in judgment).

In dissent, Justice Marshall took the position that compensatory relief is available to a private Title VI plaintiff without a showing of intent to discriminate. *See id.* at 624-34, 103 S.Ct. at 3244-49 (Marshall, J., dissenting). Justice Stevens in dissent, with Justices Brennan and Blackmun joining, also determined that compensatory damages were available. *Id.* at 635-39, 103 S.Ct. at 3250-52 (Stevens, J., dissenting).

As we read this case, five members of the Court, White, Rehnquist, Powell, Burger and O'Connor, concluded that either the question of compensatory relief for intentional discrimination under Title VI was open (White, Rehnquist, O'Connor), or no private cause of

action under Title VI exists at all (Powell, Burger). In contrast, only four Justices, Marshall, Stevens, Brennan, and Blackmun, believed such relief was available.

Both Franklin and Gwinnett argue, at various points in the briefs, that *Guardians Association* is dispositive of the issue before us. Franklin, on the one hand, argues that the analysis of *Guardians Association* implicitly overruled *Drayden*, while Gwinnett on the other disagrees. We think Franklin reads too much into *Guardians Association*.

Although it seems clear that the judgment of *Guardians Association* precludes a cause of action for compensatory damages for *unintentional* discrimination, we believe the various opinions of a majority of the Justices simply leaves *open* the question whether compensatory damages for intentional discrimination may be sought. We do not read *Guardians Association* to hold that because no damages may be sought for unintentional discrimination, this necessarily leads to the inevitable conclusion that where *intentional* discrimination is shown, a damages remedy is possible. The question is simply open, and thus the inferior courts are free, checked only by the constraints within their respective spheres of authority, to act as they deem appropriate.

Justice White's opinion in *Guardians Association* provides other important guidance which assists in resolving the case before us. Justice White analyzed the nature of Title VI itself, viz, a statute enacted pursuant to the Spending Clause, *see* 463 U.S. at 598, 103 S.Ct. at 3230 (opinion of White, J.), as well as the "limited remed[ies]" which may flow from such legislation, *see id*, at 599, 103 S.Ct. at 3231. Under such statutes, relief may frequently

be limited to that which is equitable in nature, with the recipient of federal funds thus retaining the option of terminating such receipt in order to rid itself of an injunction. *See id.* at 596, 103 S.Ct. at 3229. Moreover, with such statutes the Supreme Court has not required a defendant to "provide money to plaintiffs, much less required [a defendant] to take on . . . open-ended and potentially burdensome obligations. . . . " *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1, 29, 101 S.Ct. 1531, 1546, 67 L.Ed.2d 694 (1981). Finally, "[s]ince the private cause of action . . . is one implied by the judiciary rather than expressly created by Congress, we should respect the . . . considerations applica' 'e in Spending Clause cases and take care in defining the limits of this cause of action and the remedies available thereunder." *Guardians Ass'n*, 463 U.S. at 597, 103 S.Ct. at 3230.

Franklin argues, as does the National Women's Law Center, that the Civil Rights Remedies Equalization Amendment (codified at 42 U.S.C. § 2000d-7 (1988)), enacted in 1986, demonstrates that Title VI was passed pursuant to both the fourteenth amendment and the Spending Clause. This being true, a more liberal view of the damages question is in order, they contend. We disagree. The language of the statute, as far as we can tell, has no direct bearing on the question whether a cause of action for money damages will lie. Instead, the language only eliminates the sovereign immunity of States under the eleventh amendment in response to *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 105 S.Ct. 3142, 87 L.Ed.2d 171 (1985).[7] The legislation makes clear that States may

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[7] The Civil Rights Remedies Equalization Amendment provides the following:

(Continued on following page)

now be sued under Title IX and other named statutes to the same extent that other entities may be sued under the statutes. But it does not directly address the question whether money damages can be had under the Title IX, nor does it suddenly change the original authority under which Congress passed the legislation, from that of the Spending Clause, to the fourteenth amendment.

Title IX, like Title VI, is Spending Clause legislation. Therefore, we proceed with extreme care when we are asked to find a right to compensatory relief, where Congress has not expressly provided such a remedy as a part of the statutory scheme, where the Supreme Court has not spoken clearly, and where binding precedent in this circuit is contrary.

(Continued from previous page)

> (1) A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 794 of Title 29, title IX of the Education Amendments of 1972, the Age Discrimination Act of 1975 [42 U.S.C.A. § 6106 et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000d et seq.], or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.
>
> (2) In a suit against a State for a violation of a statute referred to in paragraph (1), remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in the suit against any public or private entity other than a State.

42 U.S.C. § 2000d-7 (1986).

We do not believe we are constrained by *Guardians Association* on the issue of compensatory damages for intentional discrimination. Nevertheless, we do remain bound to apply the law of this circuit, which includes precedent of the Fifth Circuit handed down prior to the formation of this circuit. *See Bonner*, 661 F.2d at 1207. Because we conclude above that the Supreme Court has not overruled *Drayden* either explicitly or implicitly, we are bound to follow *Drayden's* mandate that damages are unavailable under Title VI and IX.

Finally, we note that Franklin has invited this court to apply a Title VII[8] analysis to this case. Title VI and IX, as well as Title VII, all have an antidiscrimination purpose. But while Title VI and IX speak in terms of conditional grants which may be terminated if discrimination occurs under any federally funded program, Title VII (which we find unnecessary to extensively analyze for these purposes) speaks in terms of outright prohibitions, making discrimination in an employment setting an unlawful employment practice. *See, e.g.* 42 U.S.C. § 2000e-2. We do not believe applying Title VII to Title IX would result in the kind of orderly analysis so necessary in this confusing area of the law. For this reason, we decline to do so.

With regard to the question of the liability of Dr. William Prescott as an individual, insofar as we can tell, Franklin has abandoned this issue on appeal. There is no substantive discussion of the issue in her briefs, and the issue was not touched on by counsel at oral argument.

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[8] 42 U.S.C. §§ 2000e to e-17 (1988).

For these reasons, we do not find it necessary to consider the issue.[9]

For the reasons set out above, we AFFIRM the decision of the district court.[10]

JOHNSON, Circuit Judge, concurring specially:

Guardians Association is indeed a fragmented opinion. In divining a rule of law from it to address the situation now before this Court, we must consider the holding of the case to be the " 'position taken by those Members who concurred in the judgments on the narrowest grounds.' " *Marks v. United States*, 430 U.S. 188, 193, 97 S.Ct. 990, 993, 51 L.Ed.2d 260 (1977) (quoting *Gregg v. Georgia*, 428 U.S. 153, 169, 96 S.Ct. 2909, 2923, 49 L.Ed.2d 859 n. 15 (1976)). *See also Martin v. Dugger*, 891 F.2d 807, 809 n. 2 (11th Cir.1989). In reaching the result in *Guardians Association*, five Members of the Court concluded that the appellants could not be awarded compensatory relief without a showing of intentional discrimination. *See Guardians Association*, 463 U.S. at 606-07, 103 S.Ct. at 3234-35 (White, J., announcing judgment of the Court, joined by Rehnquist, J.); *id.* at 610-11, 103 S.Ct. at 3236-37

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[9] We do, however, note that the Sixth Circuit has found there is no right to proceed against an individual under Title IX. *See, e.g., Leake v. University of Cincinnati*, 605 F.2d 255, 259-60 (6th Cir.1979).

[10] We do not here reach the question of any legal rights which Franklin may or may not have under either (1) state law or (2) any federal statute other than Title VI or IX. Any question in this regard must be considered on its own merits and in another setting.

(Powell, J., concurring, joined by Burger, C.J., and Rehnquist, J.); *id.* at 615, 103 S.Ct. at 3239 (O'Connor, J., concurring). This was the narrowest conclusion resulting in judgment and is therefore the rule to be drawn from the case. The many other suggestions made by the various concurrences and dissents regarding the kinds of remedies available under Title VI and the proof needed to achieve those remedies must be considered dicta. The opinions of Justices White and O'Connor specifically put aside the question of whether under Title VI damages may be awarded those suffering intentional discrimination. The opinions of Justices Marshall and Stevens indicate their preference to award compensatory relief to victims of discrimination under Title VI whether or not those victims can show purposeful discrimination, but their statements do not constitute an intervening rule of law which overrules the precedent of our Circuit. Until the Supreme Court or an en banc court of our own Circuit says otherwise, *Drayden* is binding precedent and we must follow it. *United States v. Machado*, 804 F.2d 1537, 1543 (11th Cir.1986) (stating that "[o]nly a decision by this court sitting en banc or the United States Supreme Court can overrule a prior panel decision").

I concur specially because I believe that *Drayden* alone is dispositive of this case. It is not necessary therefore to address the issues of whether Title VI and IX are grounded solely in the Spending Clause or whether Title VII analysis should apply to an action under Title VI or Title IX.

APPENDIX B

UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION

CHRISTINE FRANKLIN	:	
	:	CIVIL NO. 1:88-
vs.	:	cv-2929-ODE
THE GWINNETT PUBLIC SCHOOLS and DR. WILLIAM PRESCOTT	:	

ORDER

(Filed May 1, 1989)

This Title IX action is before the court on Defendants' motion to dismiss for failure to state a claim pursuant to Fed.R.Civ.P. 12(b)(6) and Plaintiff's motion for oral argument on Defendant's motion.

This claim arose in the autumn of 1986 when non-party Andrew Hill[1], a former teacher and coach at North Gwinnett High School, allegedly subjected Plaintiff, a female student, to sexual harassment including sexual intercourse. Her complaint alleges that the coach made intimate remarks to two other students who reported this to various school personnel; it also states that one of the students told an administrator that the coach had propositioned Plaintiff. Exhibit A[2] to the amended complaint indicates that once Plaintiff reported the physical harassment on February 22, 1988, district officials took action to

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[1] Plaintiff is purportedly pursuing separate causes of action against Mr. Hill in a Georgia Superior Court.

[2] This is a letter from the Office of Civil Rights to Plaintiff's attorney reporting on the findings and disposition of its investigation.

investigate the allegations and advised the coach to avoid Plaintiff. Plaintiff's complaint reveals that the investigation began sometime between March 2 and March 14, 1988.

Plaintiff claims Defendants' actions constitute violations of Title IX. She alleges that Defendant Prescott, formerly a band director at the school, attempted to intimidate her into dropping charges against the coach which she filed with the school district. She also contends that Defendant Gwinnett County Schools created a discriminatory, hostile and abusive environment in that it had actual knowledge of the coach's activities and intentionally failed to take action against him.

The Office of Civil Rights for the United States Department of Education investigated the allegations of Title IX violations in the fall of 1988. After interviewing Plaintiff and her attorney, school officials and teachers, it determined that the school district violated Title IX by failing to provide appropriate grievance procedures for students' complaints or sexual harassment. It also found that Plaintiff was deprived of her right to an education in a nondiscriminatory environment and that the coach and Defendant Prescott interfered with her right to complain about violations of Title IX. After concluding that the school district had implemented procedures to correct the violations, the Office of Civil Rights closed the investigation on December 14, 1988.

Defendants move to dismiss for failure to state a claim on which relief can be granted. Defendants argue that Plaintiff's claim is moot because the coach resigned and the school implemented the procedures required to

comply with Title IX before Plaintiff filed suit; thus, there is no longer an atmosphere of harassment or intimidation at the school. Defendants also maintain that because Title IX claims are only properly brought against institutions, the claim against Dr. Prescott must be dismissed. As well, Defendants contend that only injunctive relief, not the damages Plaintiff seeks, is available as a remedy under Title IX.

In response, Plaintiff argues that the only real issue before the court is whether compensatory relief is available under Title IX. Plaintiff contends money damages are available under Title IX for intentional acts of discrimination, citing *Guardians Assn. v. Civil Service Commission*, a Title VI case, as authority. *Id.*, 463 U.S. 582 (1983). Plaintiff asserts that the school's lack of proper grievance procedures constitutes intentional discrimination. Plaintiff contends her theory of recovery is grounded in both tort and contract, in that when the school district accepted federal funds, it contracted to comply with Title IX and it could have reasonably foreseen the circumstances under which it would violate that contract.

Plaintiff also asks the court to apply a Title VII analysis in establishing a prima facie case of sexual harassment. She argues that sexual advances toward a student are unwelcome per se. Plaintiff claims that under *Meritor Savings Bank v. Vinson*, the school is liable using both agency principles, as the coach was acting within the scope of his employment, and under a respondeat superior theory, because it failed to take remedial action. *Id.*, 477 U.S. 57 (1986).

As to her claim against Dr. Prescott, Plaintiff argues that she is an intended third party beneficiary under the school's contract with the federal government. Consequently, she contends her claim against him is based on tortious interference with contract.

The purpose of Title IX and the other statutes enacted under Congress' spending power is to ensure that the taxpayers' money is not spent in ways that discriminate.[3] *See Guardians*, 463 U.S. at 609 (Powell, J., concurring). Such legislation is analogous to a contract; "in return for federal funds, the States agree to comply with federally imposed conditions." *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1, 17 (1981).

Federal agencies may enforce compliance by withdrawing federal funds. *See, e.g.*, 20 U.S.C. §1682. In addition, courts recognize a private right of action under Title IX for injunctive relief to compel compliance. *Cannon v. University of Chicago*, 441 U.S. 677 (1979). However, no authority binding on this court endorses compensatory damages to individuals suing under Title IX.

In fact, this court is bound by precedent to the contrary. *Drayden v. Needville Independent School District*, 642 F.2d 129 (5th Cir. 1981). In *Drayden*, a case decided before the creation of the Eleventh Circuit, the Court stated that

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[3] Title IX, 20 U.S.C. §1681(a) states:

> No person in the United States shall, on the basis of sex, be excluded for participation in, be denied the benefits, of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . .

the "private right of action allowed under Title VI[4] encompasses no more than an attempt to have any discriminatory activity ceased." *Id.* at 133. The Office of Civil Rights reported that the school had corrected the violations of Title IX and was being monitored to assure continued compliance. Thus, it appears that the relief to which Plaintiff is entitled under Title IX has been obtained and her claim against the school is moot.

Absent some clear authority modifying or limiting *Drayden*, this court declines to enlarge on the existing remedies available under Title IX.[5] *Accord Lieberman v. University of Chicago*, 660 F.2d 1185 (7th Cir. 1981), *cert. denied*, 456 U.S. 937 (1982); *Nabke v. H.U.D.*, 520 F. Supp. 5

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[4] The parties agree that the interpretation and application of Title VI and Title IX are analogous. *See Cannon*, 441 U.S. at 677.

[5] Despite Plaintiff's argument to the contrary, *Guardians* does not clearly authorize the relief she seeks, monetary damages for allegedly intentional discrimination. *See id.*, 463 U.S. at 608 (Powell, J., concurring in the judgment) ("Our opinions today will further confuse rather than guide."). In *Guardians*, Justice Rehnquist joined in Justice White's opinion which found that compensatory damages were not available for unintentional discrimination. *Id.*, 463 U.S. at 603. The opinion "puts aside" a ruling on cases of intentional discrimination, but in dicta notes that it is not uncommon for the extent of a defendant's liability to turn on the extent of culpability. *Id.* at 597 and n. 20. Justice Powell and Chief Justice Burger believed no private relief should be granted under any circumstances. *Id.* at 607 n. 27. Justice O'Connor did not reach the issue. *Id.* at 612 n. 1. In their respective dissents Justice Marshall and Justices Stevens, Brennan and Blackmun indicated that they thought money damages were within the purview of Title VI. *Id.* at 615 (Marshall, J., dissenting) and 635-635 (Stevens, J., dissenting).

(W.D. Mich. 1981); *but cf. Paisey v. Vitale*, 634 F. Supp. 741 (S.D. Fla. 1986), *aff'd on other grounds*, 807 F.2d 889 (11th Cir. 1986) (suggesting money damages may be appropriate for intentional violations of Title IX). Inasmuch as Plaintiff claims that the only real issue in this case is whether money damages are available under Title XI, she fails to state a claim upon which the relief she seeks can be granted by this court.

As to the Plaintiff's claim against Defendant Prescott, as stated above, Title IX is directed toward recipients of federal funds. 20 U.S.C. §1682. Plaintiff has not alleged that Defendant Prescott is such a recipient. Moreover, Title IX provides no basis for money damages on a claim for tortious interference with contract against an individual. In fact, Plaintiff has provided no authority for the contention that Title IX would support any claim against an individual. Consequently, Plaintiff fails to state a federal claim and thus this court lacks subject matter jurisdiction due to the absence of diversity between the parties.

Accordingly, Defendants' Motion to dismiss for failure to state a claim is hereby GRANTED. In light of this decision, Plaintiff's motion for oral argument is DENIED.

SO ORDERED, this 1 day of May, 1989.

/s/ Orinda D. Evans
ORINDA D. EVANS
UNITED STATES DISTRICT
JUDGE

ENTERED ON DOCKET
MAY 5 1989
L.D.T. CLERK
BY DEPUTY CLERK

ATTEST: A TRUE COPY
CERTIFIED THIS
DEC 04 1990
Luther D. Thomas, Clerk
By: /s/ B Jackson
Deputy Clerk

(SEAL)

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 89-8393

D.C. Docket No. 1:88-cv-2922-ODE

CHRISTINE FRANKLIN,

Plaintiff-Appellant,

versus

THE GWINNETT COUNTY PUBLIC SCHOOLS, a Local Education Agency (LEA), DR. WILLIAM PRESCOTT, An Individual,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Georgia

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Before JOHNSON, Circuit Judge, HILL* and HENLEY**, Senior Circuit Judge.

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* *See* Rule 34-2(b), Rules of the U.S. Court of Appeals for the Eleventh Circuit.

** Honorable J. Smith Henley, Senior U.S. Circuit Judge for the Eighth Circuit, sitting by designation.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby AFFIRMED;

It is further ordered that the plaintiff-appellant pay defendants-appellees the costs on appeal to be taxed by the Clerk of this Court.

JOHNSON, Circuit Judge, concurred specially.

Entered: September 10, 1990
For the Court: Miguel J. Cortez, Clerk

By: /s/ David Maland
Deputy Clerk

A True Copy
Attested:

Clerk, U.S. Court of Appeals,
Eleventh Circuit
By: /s/ Keith Daniels
Deputy Clerk

ISSUED AS MANDATE: OCT 05 1990

(SEAL)

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 89-8393

CHRISTINE FRANKLIN,

Appellant,

v.

GWINNETT COUNTY PUBLIC SCHOOLS,
a local education agency (LEA),
DR. WILLIAM PRESCOTT, an individual,

Appellees.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF GEORGIA,
ATLANTA DIVISION

BRIEF OF *AMICI CURIAE* NATIONAL WOMEN'S LAW CENTER, AMERICAN ASSOCIATION OF UNIVERSITY WOMEN, AMERICAN CIVIL LIBERTIES UNION, AMERICAN CIVIL LIBERTIES UNION OF GEORGIA, AMERICANS FOR DEMOCRATIC ACTION, CENTER FOR WOMEN POLICY STUDIES, COALITION OF LABOR UNION WOMEN, DISABILITY RIGHTS EDUCATION AND DEFENSE FUND, DISPLACED HOMEMAKERS NETWORK, MENTAL HEALTH LAW PROJECT, MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, NATIONAL ASSOCIATION FOR GIRLS AND WOMEN IN SPORT, NATIONAL ORGANIZATION FOR WOMEN, INC., NOW LEGAL DEFENSE AND EDUCATION FUND, OLDER WOMEN'S LEAGUE, WOMEN EMPLOYED, WOMEN'S EQUITY ACTION LEAGUE, AND WOMEN'S LAW PROJECT

Ellen J. Vargyas
Marcia D. Greenberger
National Women's Law Center
1616 P Street, N.W.
Washington, D.C. 20036
(202) 328-5160

Counsel for *Amici Curiae*

Dated: July 7, 1989

CERTIFICATE OF INTERESTED PERSONS

In conformance with 11th Cir. R. 28-2(b), the undersigned counsel for *amici curiae* National Women's Law Center *et al.* certifies:

1. The trial judge in this case was the Honorable Orinda D. Evans.

2. Ellen J. Vargyas and Marcia D. Greenberger of the National Women's Law Center are counsel for *amici curiae*. Appellant is represented by Stephen M. Katz of the law firm of Weinstock & Scavo, P.C. and appellee is represented by Frank C. Bedinger, III of the law firm of Freeman & Hawkins. To the knowledge of counsel for *amici curiae*, other attorneys interested in the outcome of this particular case include Victoria Sweeney of the law firm of Tennant, Davidson, Thompson & Sweeney; Arnold Wright, Jr.; Philip L. Hartley of the law firm of Harben & Hartley; Walter Britt of the law firm of Pruitt & Britt; and E. Freeman Leverett, Esq. of the law firm of Heard, Leverett & Phelps, P.C. Except for the parties *amici curiae*, listed below counsel for *amici curiae* are not aware of other attorneys, persons, associations of persons, firms, partnerships or corporations that have an interest in the outcome of this particular case.

3. *Amici curiae* include: The National Women's Law Center, American Association of University Women, American Civil Liberties Union, American Civil Liberties Union of Georgia, Americans For Democratic Action, Center for Women Policy Studies, Coalition of Labor Union Women, Disability Rights Education and Defense Fund, Displaced Homemakers Network, Mental Health Law Project, Mexican American Legal Defense and Educational Fund, National Association for Girls and Women in Sport, National Organization for Women, Inc., NOW Legal Defense and Education Fund, Older Women's League, Women Employed, Women's Equity Action League, and Women's Law Project.

These representations are made in order that judges of this Court, *inter alia*, may evaluate possible disqualification or recusal.

Respectfully submitted,

/s/ Marcia D. Greenberger
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Counsel for *Amici Curiae*

Dated: July 7, 1989

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*Authority upon which *amici curiae* primarily rely.

STATEMENT OF JURISDICTION AND STANDARD OF REVIEW

The jurisdiction of this Court rests on 28 U.S.C. § 1291. The issue addressed in this brief *amici curiae* presents a pure question of law, as to which this Court's review is *de novo*.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 89-8393

CHRISTINE FRANKLIN,

Appellant,

v.

GWINNETT COUNTY PUBLIC SCHOOLS,
a local education agency (LEA),
DR. WILLIAM PRESCOTT, an individual,

Appellees.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE NORTHERN
DISTRICT OF GEORGIA, ATLANTA DIVISION

BRIEF OF *AMICI CURIAE*

INTEREST OF AMICI CURIAE

Amici curiae include civil rights, advocacy, labor, and educational organizations dedicated to the elimination of

discrimination in our society.[1] *Amici* believe that this case will have important ramifications for the ability of victims of discrimination by federally-assisted programs and activities to vindicate their basic rights. In particular, a decision that compensatory damages are not available pursuant to Title IX of the Education Amendments of 1972 will seriously undermine Congress' historic and consistent intent that all such victims of discrimination have an effective remedy for the wrongs they have suffered. In addition, it will subvert the clear weight of judicial authority that monetary damages are available for intentional violations of Title IX.

STATEMENT OF THE ISSUE PRESENTED

Are monetary damages available in actions brought pursuant to Title IX of the Education Amendments of 1972?

STATEMENT OF THE CASE

Amici Curiae adopt the statement of the case set forth in the brief of plaintiff-appellant, Christine Franklin.

SUMMARY OF THE ARGUMENT

Contrary to the conclusion of the court below, monetary damages are available in actions brought pursuant to Title IX of the Education Amendments of 1972.

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[1] The interest of each individual amicus curiae is set forth in the Appendix to this Brief.

1. In *Guardians Ass'n v. Civil Service Comm'n*, a majority of the Supreme Court held that monetary damages are available for intentional violations of Title VI of the Civil Rights Act of 1964. The clear majority of courts interpreting *Guardians* concur with this reading. Because Title IX was expressly modeled on Title VI and its framers intended that it be applied in the same fashion, this holding applies equally here.

2. Title IX is based, at least in part, on Congress' authority to enforce the fourteenth amendment. Consequently, limitations on inferring remedies in legislation enacted pursuant to the spending power do not apply. A damages remedy is appropriately construed because Title IX's history and interpretation, as evidenced, *inter alia*, by the Supreme Court's analysis in *Cannon v. University of Chicago*, as well as the enactment of the Civil Rights Attorneys Fees Awards Act of 1976 and the Civil Rights Remedies Equalization Act Amendment of 1986, clearly demonstrate that Congress intended to create individually enforceable rights secured by meaningful remedies including monetary damages.

3. Even if this Court finds that Title IX is spending power legislation, intentional discrimination is an exception to the general rule that individual monetary damages may not be implied.

ARGUMENT

I. INTRODUCTION

Squarely before this Court is the important question of whether damages are available in actions brought

pursuant to Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688. ("Title IX").[2] This case arises out of particularly egregious allegations by the plaintiff-appellant, Christine Franklin ("Ms. Franklin"), of sexual harassment.[3] Ms. Franklin, a high school student, has explicitly alleged that the discrimination she has suffered was intentional in nature and she seeks monetary compensation for her injuries.[4]

The court below dismissed Ms. Franklin's complaint on the grounds that Title IX does not state a claim for damages:

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[2] Title IX prohibits sex discrimination in federally funded education programs and activities. It provides, in pertinent part:

> No person in the United States shall on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.

20 U.S.C. § 1681(a).

[3] Sexual harassment clearly constitutes a violation of Title IX. *See. e.g., Lipsett v. University of Puerto Rico*, 864 F.2d 881 (1st Cir. 1988); *Moire v. Temple University School of Medicine*, 613 F. Supp. 1360 (E.D. Pa. 1985), *aff'd mem.*, 800 F.2d 1136 (3d Cir. 1986). Indeed, in the instant case, the Department of Education's Office for Civil Rights, which is charged with the administrative enforcement of Title IX, determined that the defendant school district had violated Title IX based on its deprivation of Ms. Franklin's "right to an education in a nondiscriminatory environment." *Slip op.* at 2.

[4] Because the procedural posture of this case is that of a motion to dismiss, all allegations must be accepted as true and be liberally construed so as to do "substantial justice." *Conley v. Gibson*, 355 U.S. 41, 45-46, 48 (1957).

> Inasmuch as Plaintiff claims that the only real issue in this case is whether money damages are available under Title IX she fails to state a claim upon which the relief she seeks can be granted by this court.

Slip op. at 6. In reaching this conclusion, the court explicitly declined to apply the Supreme Court's decision in *Guardians Ass'n v. Civil Service Comm'n*, 463 U.S. 582 (1983), *slip op.* at 5 n.5, which addressed the question of damages under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d ("Title VI"), and which is fully applicable, as well, to Title IX.[5] Instead, the court relied on pre-*Guardians* precedent for the proposition that no damages remedy is available. The court further held that Title IX was enacted pursuant to Congress' spending power authority and invoked the doctrine of *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981), apparently for the proposition that an individual damages remedy is, accordingly, inappropriate. *Slip op.* at 4.

Amici submit that the court below erred in dismissing Ms. Franklin's complaint on the basis that she is not entitled to monetary relief under Title IX. The proper

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[5] Title IX was expressly modeled on Title VI as were Section 504 of the Rehabilitation Act, 29 U.S.C. § 794 ("Section 504") and the Age Discrimination Act, 42 U.S.C. §§ 6101 *et seq.* The same reasoning and legal doctrine apply in construing issues common to the four statutes. *See, e.g., United States Dept. of Transp. v. Paralyzed Veterans of America*, 477 U.S. 597, 600 n.4 (1986); *Cannon v. University of Chicago*, 441 U.S. 677, 694-96 (1979). These include the availability of damages. *Consolidated Rail Corp. v. Darrone*, 465 U.S. 624, 630-631 (1984).

interpretation of *Guardians* – supported by the overwhelming weight of authority – is that damages are available for intentional violations of Title IX. Further, contrary to the suggestion of the court below through its reference to *Pennhurst*, there is no constitutional impediment to the award of such relief. Indeed, the legislative record demonstrates that Congress intended that Title IX create individually enforceable rights secured by monetary damages. The decision below should be reversed and the case remanded for further proceedings to reach the merits of Ms. Franklin's claim.

II. GUARDIANS ESTABLISHES THE AVAILABILITY OF MONETARY DAMAGES FOR THE INTENTIONAL VIOLATION OF TITLE IX

A. MONETARY DAMAGES ARE AVAILABLE UNDER TITLE IX

The Supreme Court's decision in *Guardians Ass'n v. Civil Service Comm'n*, 463 U.S. 582 (1983), firmly establishes the availability of monetary relief for intentional violations of Title IX.[6] Plaintiffs in *Guardians*, black and hispanic police officers, had challenged the police department's entrance examinations as having a discriminatory

[6] This holding is fully consistent with well-established jurisprudence that federal courts will adjust their remedies as necessary to protect federally created rights and they may use any available remedy to rectify violations of such rights. *See Bell v. Hood*, 327 U.S. 678, 684 (1946). Indeed, the very existence of a statutory right implies the existence of all necessary and appropriate remedies. *See Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 239 (1969).

impact on the basis of race and national origin in violation of, *inter alia*, Title VI. The Supreme Court reversed the lower court's decision requiring proof of discriminatory intent to make out the plaintiffs' claim. *Id.* at 584. While five separate opinions were filed in connection with the case, a majority of the Court held that compensatory damages are available for intentional violations of Title VI; the remainder of the Court simply did not reach the issue.

Justice White, writing for the Court in an opinion joined by then-Justice Rehnquist, held that private Title VI plaintiffs cannot recover compensatory damages unless they can show discriminatory intent. *Guardians*, 463 U.S. at 584; *see also id.* at 597, 607 n.27.[7] In addition, the four dissenting Justices supported the availability of compensatory damages under Title VI without reference to intent. *See* 463 U.S. at 615 (Marshall, J., dissenting); 463 U.S. at 635-40 (Stevens, J., dissenting, joined by Brennan and Blackmun, JJ.). Thus, six Justices would allow, at least, compensatory damages for intentional violations of Title VI.[8]

[7] Justice White relied on *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981), to limit the relief available for unintentional violations of Title VI, *see id.* at 596, and then explicitly excepted cases of intentional discrimination from this restriction, *see id.* at 597. See discussion, *infra*, regarding the impact of *Pennhurst* on the availability of damages.

[8] Justice Powell, joined by Chief Justice Burger, concurred on the grounds that no private right of action exists under Title VI and that Title VI only prohibits intentional discrimination, *see Guardians*, 463 U.S. at 608-10, and thus did not reach the

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The clear majority of courts interpreting *Guardians* concur with this construction. For example, in the Title VI context, in *Craft v. Board of Trustees of the Univ. of Ill.*, 793 F.2d 140, 142 (7th Cir.), *cert. denied*, 497 U.S. 829 (1986), the Seventh Circuit relied on *Guardians* to approve the district judge's instruction to the jury that plaintiffs had to show discriminatory intent in order to recover compensatory relief for their alleged dismissal from an educational program in violation of Title VI. In so holding it observed, "the current position of the Court is that the granting of compensatory relief under § 2000d requires proof of discriminatory intent." *Id.* In *Singh v. Superintending School Comm. of Portland*, 601 F. Supp. 865 (D. Maine 1985), the court relied on *Guardians* to affirm the magistrate's decision not to strike the plaintiff's claim for damages for intentional employment discrimination in violation of Title VI. And the district court in *Paisey v. Vitale*, 634 F. Supp. 741 (S.D. Fla.), *aff'd on other grounds*, 807 F.2d 889 (11th Cir. 1986), reached a similar result, relying on *Guardians* to deny the defendant's motion to dismiss the plaintiff's claim for monetary damages for an intentional violation of Title VI's anti-retaliation regulation.

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question of damages. Justice O'Connor, in a concurring opinion, noted her disagreement with Justice White's limitation on the scope of equitable relief available for the reasons given in Justice Stevens' opinion, *see* 463 U.S. at 612 (O'Connor, J., concurring), but explicitly declined to reach the issue of the availability of damages relief in a private cause of action under Title VI on the ground that petitioners failed to show the requisite intentional discrimination, *see id.* at 612 n.1.

Courts have also extended this interpretation of *Guardians* to Title IX and Section 504. The district court in *Beehler v. Jeffes*, 664 F. Supp. 931, 939-40 and nn.13-14 (M.D. Pa. 1986), read *Guardians* to authorize compensatory damages for intentional violations of Title IX. Similarly, *Wilder v. City of N.Y.*, 568 F. Supp. 1132, 1135 (E.D. N.Y. 1983) relied on *Guardians* to find damages available for violations of Section 504. Indeed, *Wilder* held that damages are available under Section 504 without regard to intent.[9] *See also Storey v. Board of Regents of Univ. of Wis. System*, 604 F. Supp. 1200, 1202 n.3 (W.D. Wis. 1985).[10]

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[9] In addition, numerous courts have awarded damages for violations of Section 504 without reference to whether the discrimination was intentional. *See. e.g., Greater L.A. Council on Deafness v. Zolin Inc.*, 812 F.2d 1103, 1107 (9th Cir. 1987); *Meiner v. State of Missouri*, 673 F.2d 969, 977-79 (8th Cir. 1982), *cert. denied*, 459 U.S. 909, 916 (1982); *Christopher N. v. McDaniel*, 569 F. Supp. 291, 295-96 (N.D. Ga. 1983); *Gregg B. v. Bd. of Educ. of Lawrence School Dist.*, 535 F. Supp. 1333, 1339-40 (E.D. N.Y. 1982) (finding the purpose of section 504 furthered by allowing tuition reimbursement); *Patton v. Dumpson*, 498 F. Supp. 933, 937-39 (S.D. N.Y. 1980). Indeed, the Supreme Court has recognized that a majority of courts to have ruled on the issue have upheld actions for damages under section 504. *Smith v. Robinson*, 468 U.S. 992, 1020 n. 24 (1984).

[10] For other decisions interpreting Guardians as authorizing compensatory damages for intentional violations of the affected statutes, *see. e.g., Manecke v. School Bd. of Pinellas County. Fla.*, 762 F.2d 912, 922 n.8 (11th Cir. 1985) *cert. denied*. 474 U.S. 1062 (1986); *Carter v. Orleans Parish Public Schools*, 725 F.2d 261, 264 (5th Cir. 1984); *Marvin H. v. Austin Indep. School Dist.*, 714 F.2d 1348, 1357 (5th Cir. 1983); *Sabo v. O'Bannon*, 586 F. Supp. 1132, 1138 (E.D. Pa. 1984); *Araujo v. Trustees of Boston College*, 34 Empl. Prac. Dec. (CCH) ¶ 34,409 (D. Mass. Dec. 16,

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While not all lower courts have reached this result, those post-*Guardians* decisions that have refused to imply a damages remedy in the face of an intentional violation of one of the affected civil rights statutes have done so with little analysis and, typically, no mention of *Guardians*.[11] These courts have principally relied, instead, on pre-*Guardians* decisions denying damages relief, such as *Drayden v. Needville Indep. School Dist.*, 642 F.2d 129 (5th Cir. 1981)[12] and *Lieberman v. University of Chicago*, 660 F.2d 1185 (7th Cir. 1981), *cert. denied*, 456 U.S. 937 (1982).[13] Indeed, the court below relied on *Drayden* to dismiss Ms. Franklin's claim for damages under Title IX and noted *Lieberman*.

However, *Drayden* and *Lieberman* are no longer good law following *Guardians*. To begin with, the *Guardians*

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1983); *Organization of Minority Vendors Inc. v. Ill. Cent. Gulf R.R.*, 579 F. Supp. 574, 594-95 n.10 (N.D. Ill. 1983). *But see Robinson v. English Dept. of the Univ. of Pa.*, Nos. 87-2476, 87-2554 at 15 (E.D. Pa. Nov. 8, 1988) (LEXIS, Genfed Library, Dist. file) (citing *Guardians* for the proposition that, "although the Supreme Court has not yet ruled upon this precise issue, the prevailing view expressed in caselaw is that a private action under Title VI does not entitle a prevailing plaintiff to general or punitive damages").

[11] *See, e.g., Robinson v. English Dept. of the Univ. of Pa., supra; Bagley v. Hoopes*, No. 81-1126-Z (D. Mass., Aug. 6, 1985) (LEXIS, Genfed Library, Dist. file) (Title IX); *Pruitt v. Ill. Township High School*, No. 83 C 4346 (N.D. Ill. Jan. 20, 1984) (LEXIS, Genfed Library, Dist. file) (Title IX); *Davis v. Spanish Coalition for Jobs. Inc.*, 676 F. Supp. 171 (N.D. Ill. 1988) (Title VI).

[12] *See. e.g.. Davis*, 676 F. Supp. at 172.

[13] *See. e.g., Cannon v. University of Health Sciences/The Chicago Med. School*, 710 F.2d 351 (7th Cir. 1983); Lipsett, 864 F.2d at 884 n.3; *Bagley, supra; Pruitt, supra.*

Court was fully aware of their existence, *Guardians*, 463 U.S. at 602 n.23, but nonetheless took the view that monetary damages should be available in the face of the intentional violation of the statute. In any event, because the court in *Drayden* confined its analysis to the conclusory statement that a cause of action under Title VI is limited to the right to have the discriminatory activity ceased, it is now of no precedential – or even persuasive – value. Similarly, the result in *Lieberman* cannot survive *Guardians*.[14] In *Lieberman*, a Title IX case, the court initially looked to Title VI for guidance. Finding the availability of damages under Title VI unresolved. it relied on its interpretation of *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981), as prohibiting the inference of an individual damages remedy under spending power legislation, *Id.* at 1187, to find damages unavailable under Title IX. However, as *Guardians* adopted a different view of *Pennhurst* in the case of intentional discrimination, *Lieberman's* analysis cannot survive. The Seventh Circuit itself took the opposite view as it held, post-*Guardians*, that damages are available in the face of an intentional violation of Title VI. *See Craft v. Board of. Trustees*, 793 F.2d at 140. See discussion *infra* regarding the impact of *Pennhurst* on this case.

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[14] At least one court in the Seventh Circuit has noted the inconsistency between *Lieberman* and *Guardians*. *See Organization of Minority Vendors. Inc. v. Ill. Cent. Gulf R.R., et al.*, 579 F. Supp. 574, 595 n.10 (N.D. Ill. 1983); *see also Beehler v. Jeffes*, 664 F. Supp. 931, 939-40 and nn.13-14 (M. D. Pa. 1986) (acknowledging *Lieberman*, but holding that, based on Guardians plaintiffs could recover damages for an intentional violation of Title IX).

B. FULL MONETARY DAMAGES ARE AVAILABLE WITHOUT LIMITATION TO EQUITABLE RELIEF

Given the clear authority for the award of damages when discrimination is shown, courts have begun to address the issue of the extent of damages which are available under the affected statutes. Most have held that the full range of compensatory damages is appropriately invoked. *See. e.g., Recanzone v. Washoe County School Dist.*, 696 F. Supp. 1372, 1378 (D. Nev. 1988) (awarding damages for emotional and psychological distress in section 504 employment discrimination case); *accord Fitzgerald v. Green Valley Area Education Agency*, 589 F. Supp. 1130, 1138 (S.D. Iowa 1984). This follows the well-established principle that monetary compensation for all injuries, including emotional distress, humiliation and indignity is the rule under the civil rights laws unless there is statutory language to the contrary. *See, e.g., Carey v. Piphus* 435 U.S. 247, 263-64 (1978) (Section 1983); *H.C. by Hewett v. Jarrard* 786 F.2d 1080, 1088 (11th Cir. 1986) (Section 1983); *Stallworth v. Shuler*, 777 F.2d 1431 (11th Cir. 1985) (Sections 1981 and 1983); *Miener v. State of Missouri*, 673 F.2d at 977 ("the right to seek damages for civil rights violations is an accepted feature of the American judicial system.")

Some courts, in contrast, have held that compensatory damages may be limited to equitable relief under statutes prohibiting discrimination in federally assisted programs. In particular, in addressing claims of employment discrimination under Section 504, several courts have limited plaintiffs to the equitable remedies available under Title VII of the Civil Rights Act of 1964, 42 U.S.C.

§ 2000e.[15] In reaching this conclusion, they have sought to avoid what they perceived as the inconsistency of providing broader remedies for employment discrimination under Section 504 than under Title VII.

This Court should not limit Ms. Franklin's remedy to equitable relief for at least two reasons. First, although both Title IX and Title VII prohibit discriminatory behavior, they have markedly different remedial schemes. Second, where discrimination in non-employment matters is involved, the concern raised by the existence of inconsistent remedial schemes is not an issue.

Title VII provides for specific remedies, including injunctions restraining unlawful employment practices, hiring or reinstatement of employees, back pay and "any other *equitable relief* as the court deems appropriate," 42 U.S.C. § 2000e-5(g) (emphasis added). Courts have reasonably construed these remedies to be exclusive.[16] Title IX contains no such language in its remedial provision, and the Supreme Court has determined that its explicit remedial scheme is not exclusive. *Cannon v. University of Chicago*, 441 U.S. at 677. Consequently, no basis exists for

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[15] See *Byers v. Rockford Mass Transit*, 635 F. Supp. 1387 (N.D. Ill. 1986); *Shuttleworth v. Broward County*, 649 F. Supp. 35 (S.D. Fla. 1986); *Bradford v. Iron County C-4 School District*, 37 Emp. Prac. Dec. (CCH) ¶ 35,404 (E.D. Mo., June 13, 1984). Amici believe that these cases were wrongly decided but because they are distinguishable from the instant case, *see infra*, this Court need not reach this issue.

[16] *See, e.g., Walker v. Ford Motor Co.*, 684 F.2d 1355, 1364 (11th Cir. 1982); *Padway v. Palches*, 665 F.2d 965, 968, (9th Cir. 1982).

limiting Title IX remedies to the statutory remedies provided under Title VII. The Supreme Court has recently confirmed that compensatory damages not available under the Title VII remedial scheme are clearly allowed in the analogous context of employment discrimination cases brought under 42 U.S.C. §1981. *Patterson v. McLean Credit Union*, 57 U.S.L.W. 4705, 4709 n.4 (June 13, 1989). *See also Stallworth v. Shuler*, 777 F.2d 1431 (11th Cir. 1985) (award of damages for emotional distress and humiliation); *Gunby v. Pennsylvania Electric Co.*, 840 F.2d 1108 (3d Cir. 1988); *Carter v. Duncan-Huggins Ltd.*, 727 F.2d 1225 (D.C. Cir. 1984).

Furthermore, allowing compensatory damages in non-employment claims under Title IX – such as this case – in no way creates a remedial scheme which is inconsistent with that of any other applicable statute. Indeed, limiting victims of non-employment discrimination to equitable relief has substantially more restrictive consequences than it does in employment cases. In particular, equitable relief in employment cases includes a monetary award in the form of back pay, providing victims of discrimination with significant compensation for their injuries. But as a practical matter, limiting Ms. Franklin to equitable relief would likely foreclose the availability of any compensation for her injuries. Ms. Franklin should be compensated for the full extent of her emotional and any other injuries caused by the deprivation of her civil rights at issue in this case.[17]

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[17] *Amici* also note several decisions which have declined to permit a cause of action under 42 U.S.C. § 1983 to enforce the

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In sum, *Guardians* and its progeny strongly support the availability of the full range of compensatory damages – including compensation for emotional injuries – for the intentional violation of Title IX. The lower court erred in failing to reach this result.

III. CONTRARY TO THE CONCLUSION OF THE LOWER COURT, THERE IS NO CONSTITUTIONAL IMPEDIMENT TO THE AWARD OF DAMAGES IN THIS CASE

The lower court relied for its determination that damages are not available under Title IX, in substantial part, on the view that Title IX is spending power legislation and private remedies are, accordingly, limited. *Slip op.* at 4. Because Congress based Title IX on its authority under Section 5 of the fourteenth amendment in addition to the spending power, and intended to create individually enforceable rights secured by a damages remedy, this reasoning is misplaced. Further, intentional discrimination constitutes an exception to the principle that individual remedies may not be implied under spending power legislation. There is no constitutional impediment to the award of damages in this case.

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statutes at issue. Relying on *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n.*, 453 U.S.1 (1981), they have found that these statutes create comprehensive remedial schemes which preclude access to § 1983. *See. e.g., Tyus v. Ohio Dept. of Youth Services*, 606 F. Supp. 239 (S.D. Ohio 1985); *Mabry v. State Bd. for Community Colleges*, 597 F. Supp. 1235 (D. Colo. 1984), *aff'd on other grounds*, 813 F.2d 311 (10th Cir.), *cert. denied.* 108 S. Ct. 148 (1987). Section 1983, of course, provides a damages remedy. *See, e.g., Carey v. Piphus*, 435 U.S. at 247.

A. BECAUSE TITLE IX IS BASED ON CONGRESS'S AUTHORITY TO ENFORCE THE FOURTEENTH AMENDMENT, AND CONGRESS INTENDED THE AVAILABILITY OF MONETARY RELIEF, A DAMAGES REMEDY IS PROPERLY INVOKED

The lower court's point of reference was *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981), which raised the question of whether the Developmentally Disabled Assistance and Bill of Rights Act of 1975, 42 U.S.C. §§ 6000 *et. seq.* created individually enforceable rights and obligations.[18] The *Pennhurst* Court's inquiry focused on congressional intent to create such individual rights, which, in turn, was closely linked to the constitutional authority for the legislation:

> In discerning congressional intent, we necessarily turn to the possible sources of Congress' power to legislate, namely, Congress' power to enforce the Fourteenth Amendment and its power under the Spending Clause to place conditions on the grant of federal funds.

Pennhurst, 451 U.S. at 15.

Spending power legislation, which is "much in the nature of a contract," binds the recipient of federal funds "to comply with federally imposed conditions" which are "unambiguously" expressed in connection with the grant

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[18] As Justice Stevens properly pointed out in his dissent to *Guardians*, *Pennhurst* "concerned the existence or non-existence of statutory rights, not remedies." *Guardians*, 463 U.S. at 636. Nonetheless, as the lower court would extend *Pennhurst* to the question of remedies, *Amici* will consider its impact on the availability of damages.

of those funds. *Id.* at 17;[19] *see also Guardians*, 463 U.S. at 596. By contrast, Congress' authority to enforce the fourteenth amendment is not dependent on the concept of the knowing acceptance of contract terms. Rather, Congress has the power to impose unilaterally "rights and obligations," *Pennhurst*, 451 U.S. at 17, to achieve the fourteenth amendment's promise of equality under the law.

A review of Title IX and its legislative history shows that, unlike the legislation at issue in *Pennhurst*, which was nothing "other than a typical funding statute," *id.* at 22, and therefore did not give rise to individually enforceable rights, Title IX is substantially more. It certainly has contractual, and hence, spending power implications, as Justice White determined in *Guardians*, 463 U.S. 582, at 596-603 (1983), although it is noteworthy that only one other member of the Court joined his opinion. However, Title IX also unmistakably bears the imprint of the fourteenth amendment as it creates individually enforceable rights through an implied private right of action. *Cannon v. University of Chicago*, 441 U.S. 677 (1979). Such a private right of action could not be inferred in legislation based solely on the spending power. *See Pennhurst*, 451 U.S. at 1. As the Court in *Cannon* held:

> Title IX, like its model Title VI, sought to accomplish two related, but nevertheless somewhat different, objectives. First, Congress wanted to avoid the use of federal resources to support discriminatory practices; second, it wanted to

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[19] When acting in accordance with these principles, Congress can create individually enforceable rights and obligations under its spending power authority. *See Pennhurst*, 451 U.S. at 17; *cf. Atascadero State Hosp. v. Scanlon*, 473 U.S. 234 (1985).

> provide individual citizens effective protection against those practices. Both of these purposes were repeatedly identified in the debates on the two statutes.

Id. at 704.[20]

To be sure, Title IX's contemporaneous legislative history does not address the precise question of the constitutional authority under which it was enacted. Nonetheless, in addition to *Cannon's* analysis of that history as just set forth, two subsequent Acts of Congress substantially affecting Title IX, and the Supreme Court decision giving rise to one of them, make the fourteenth amendment connection clear. These include the Civil Rights Attorneys Fees Awards Act of 1976, 42 U.S.C. § 1988 (Section 1988) and the Civil Rights Remedies Equalization Act Amendment, section 1003 of the Rehabilitation Act of 1986, 42 U.S.C. § 2000d-7, which reversed the Supreme Court's decision in *Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985).

Section 1988 authorizes attorneys fees to prevailing parties in actions to enforce a series of civil rights statutes including, *inter alia*, Title IX. Congress expressly invoked its authority under the fourteenth amendment in enacting the legislation:

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[20] The assumption that Title IX is simply spending power legislation, in large part based on Justice White's opinion in *Guardians, cf. U.S. v. Alabama*, 828 F.2d 1532, 1547 (11th Cir. 1987), overlooks the second congressional objective so clearly stated in *Cannon*. *Amici* respectfully submit that findings to such effect should be reviewed in light of the analysis, *infra*, showing the strong fourteenth amendment implications of Title IX.

> Fee awards are therefore provided in cases covered by S.2278 [the bill which was enacted into law] in accordance with Congress' powers under, inter alia, the Fourteenth Amendment, Section 5.

S. Rep. No. 1011, 94th Cong. 2d Sess. 5, *reprinted in* 1976 U.S. Code Cong. & Admin. News 5913.[21] Because Section 1988 itself creates no rights, drawing its substance from the statutes it is designed to enforce, the only inference to be drawn from this history is that the underlying statutes were also designed to enforce the fourteenth amendment.[22] This very much includes Title IX.

The fourteenth amendment link, generally, and the availability of monetary damages, in particular, is further strengthened by the Supreme Court's decision in *Atascadero* and Congress' response to it. *Atascadero* addressed the question of whether Section 504 of the

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[21] *See also Cannon*, 441 U.S. at 686 n.7 (quoting Senator Kennedy, 122 Cong. Rec. 31472 (1976)) ("It is Congress' obligation to enforce the 14th Amendment by eliminating entirely such forms of discrimination, and that is why both title VI of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972 have been included [in the amendment to § 1988].")

[22] *Cannon* relied on this legislative record in determining that there is a private right of action under Title IX. While the Court acknowledged that post-enactment history does not have "the weight of contemporary legislative history" it recognized that it would be "remiss if [it] ignored these authoritative expressions concerning the scope and purpose of Title IX and its place within 'the civil rights enforcement scheme' that successive Congresses have created over the past 110 years." *Cannon*, 451 U.S. at 686 n.7.

Rehabilitation Act abrogated the states' eleventh amendment immunity. The majority did not reach the ultimate question of whether Section 504 was enacted pursuant to the fourteenth amendment, but based on the record before it, the Court assumed that it was. *Id.* at 244 n.4. Indeed, the holding of the case is explicitly based in part on the Court's interpretation of the fourteenth amendment requirements for abrogating the sovereign immunity of states. *See id.* at 242-246. Further, in the dissent, per Justice Blackmun, four justices took the express position that Section 504 was an exercise of Congress' power under Section 5 of the fourteenth amendment. *Id.* at 304.

In response, Congress promptly passed the Civil Rights Remedies Equalization Amendment, which expressly abrogates the eleventh amendment immunity of the states for violations of, *inter alia*, Title IX.[23] Congress explicitly invoked its authority both under Section 5 of the fourteenth amendment and the spending power clause in enacting the amendment. S. Rep. No. 388, 99th Cong. 2d Sess. 27 (1986).[24] The Senate Report is included in the attached appendix.

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[23] It also applies to Section 504, the Age Discrimination Act, Title VI, and the provisions of any other federal statute prohibiting discrimination by recipients of federal financial assistance.

[24] As with the history of Section 1988, this legislative history is highly probative of the pending question. As this Court has held in a similar context, "although the views of a subsequent Congress cannot override the *unmistakable* intent of the enacting one, such views are entitled to 'significant weight,' and 'particularly so when the precise intent of the

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In addition, in describing the legislation, Congress made it clear that assuring the availability of monetary damages under the enumerated statutes was one of its principal concerns. The Senate report, for example, describes *Atascadero* as holding "that the eleventh amendment bars suits against States and State agencies in Federal Court for retroactive *monetary relief* under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. Sec. 794." S. Rep. 388, 99th Cong. 2d Sess. 27 (1986) (emphasis added). It similarly describes the effect of the amendment:

> Section 1003 also explicitly provides that in a suit against a State for a violation of any of these statutes remedies, *including monetary damages*, are available to the same extent as they would be available for such a violation in a suit against any public or private entity other than a State.

Id. at 28 (emphasis added).[25]

Further, in its communication to the Congress in connection with the legislation, the Administration described *Atascadero* as proscribing monetary relief based on eleventh amendment considerations. The clear implication is that monetary damages would be available but for the issue of sovereign immunity. *See* Letter from

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enacting Congress is obscure,' " (citations omitted). *Powell By and Through Powell v. Schweiker*, 688 F.2d 1357, 1363 (11th Cir. 1982); *see also Glidden Company v. Zdanok*, 370 U.S. 530, 541 (1962).

[25] *See also* remarks of Senator Cranston, 132 Cong. Rec. S15104, S15105 (daily ed. October 3, 1986) (describing the legislation as reversing *Atascadero's* preclusion of a damages remedy under Section 504).

Assistant Attorney General John R. Bolton to Senator Orrin Hatch, 132 Cong. Rec. S15105, S15106 (daily ed. October 3, 1986).[26]

B. IN THE ALTERNATIVE, A DAMAGES REMEDY FOR INTENTIONAL DISCRIMINATION IS PROPERLY INVOKED UNDER SPENDING POWER LEGISLATION.

Even if this Court determines that Title IX is spending power legislation, the award of damages is still appropriate. In delivering the opinion of the Court in

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[26] Further support for *amici's* contention that Title IX is based in the fourteenth amendment stems from *Regents of the Univ. of California v. Bakke*, 438 U.S. 265 (1978) where the Court held that Title VI incorporates fourteenth amendment standards regarding prohibited racial discrimination. While the precise question has not been reached in the context of Title IX, the Supreme Court has held that Title VII's prohibition of sex discrimination incorporates fourteenth amendment principles, *see General Electric Co. v. Gilbert*, 429 U.S. 125, 133-34 (1976) and a number of courts have applied Title VII principles in Title IX cases. *See, e.g., Lipsett v. University of Puerto Rico*, 864 F.2d at 896-897,; *Mabry v. State Bd. of Community Colleges & Occupational Educ.*, 813 F.2d 311, 316-317 (10th Cir.) *cert. denied*, 108 S.Ct. 148 (1987). *Cf. U.S. v. New Orleans Public Service Inc.*, 553 F.2d 459, 467 (5th Cir. 1977), *cert. denied*, 454 U.S. 892 (1981) (" . . . equal employment goals themselves, reflecting important national policies, validate the use of the procurement power in the context of [Executive Order 11246, prohibiting federal contractors from discriminating on the basis of race, color, religion, sex or national origin]"); *Legal Aid Society of Alameda County v. Brennan*, 381 F. Supp. 125, 130 (N.D. Cal. 1974), *aff'd*, 608 F.2d 1319 (9th Cir. 1979) (" . . . Executive Order 11246 also has firm foundations in the fifth and fourteenth amendments to the Constitution. . . . ").

Guardians, Justice White set out intentional discrimination as an exception to the general prohibition against inferring individual remedies to enforce spending power legislation:

> In cases where intentional discrimination has been shown, there can be no question as to what the recipient's obligation under the program was and no question that the recipient was aware of that obligation. In such situations, it may be that the victim of the intentional discrimination should be entitled to a compensatory award, as well as to prospective relief in the event the State continues with the program.

Guardians at 597. Justice White based his conclusion in traditional principles of contract law, which is fully consistent with the contract-based view of Congress' spending power authority:

> It is not uncommon in the law for the extent of a defendant's liability to turn on the extent of his knowledge or culpability. Thus, it has been said that, under principles of contract law, a contracting party cannot be held liable for extraordinary harm due to special circumstances unless, at the time the contract was made, he knew or had reason to know the circumstances that made such extraordinary injury probable 'so as to have the opportunity of judging for himself as to the degree of this probability.' (citations omitted)

Id. at 597 n.20. *See Organ. of Minority Vendors v. Ill. Cent. Gulf R.R.*, 579 F. Supp. at 594-95 n.10.

In sum, contrary to the opinion of the lower court, limitations on inferring individual remedies under spending power legislation do not apply to this case. This is because Title IX is based on Congress' power under

Section 5 of the fourteenth amendment and the relevant history establishes that Congress intended to create individual rights secured by a damages remedy. Even if this Court determines that Title IX is solely spending power legislation, intentional discrimination stands as an exception to the general rule against inferring individual remedies. This view, in fact, formed the basis of Justice White's opinion in *Guardians*.

CONCLUSION

For the above-stated reasons, *amici* respectfully request this Court to reverse the decision below and remand this case for further proceedings on the merits.

Respectfully submitted,

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APPENDIX

STATEMENTS OF INTEREST OF *AMICI CURIAE*

The National Women's Law Center is a non-profit legal advocacy organization dedicated to the advancement and protection of women's rights and the corresponding elimination of sex discrimination from all facets of American life. Since 1972, the Center has worked to secure equal opportunity in education for girls and women through full enforcement of Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681 *et seq.* It has a deep and abiding interest in assuring the availability of appropriate and effective remedies under Title IX, including monetary damages.

The American Association of University Women (AAUW) promotes equity for women, education and self-development over the life span, and positive societal change. AAUW includes 140,000 members nationwide and 1,700 local branches. Vigorous enforcement of Title IX is an AAUW priority.

The American Civil Liberties Union (ACLU) is a nationwide, non-partisan, membership organization dedicated to the principles of liberty and equality embodied in the Constitution and civil rights laws. The ACLU of Georgia is a state-wide affiliate of the ACLU.

The Americans for Democratic Action (ADA), a progressive, independent political organization, is a national coalition of civil rights and feminist leaders, academicians, business people and trade unionists, grass roots activists, elected officials, church leaders, professionals, members of Congress and many others. ADA is dedicated

to the achievement of freedom, equality of opportunity, economic security and peace for all people through education and political action.

The Center for Women Policy Studies (CWPS) is a non-profit feminist organization founded in 1972. CWPS is dedicated to research and advocacy to further women's rights. One of CWPS' priorities is the achievement of educational equity. To that end CWPS supports a broad and effective interpretation of Title IX.

The Coalition of Labor Union Women (CLUW) is a national membership organization of women and men who are members of more that [sic] 65 International Unions. CLUW has 45 active chapters throughout the United States and a National Executive Board composed of the female leadership of these International Unions. A primary purpose of this national coalition is to unify all Union Women in a viable organization dedicated to the achievement of participation of women within their unions and to removing all forms of discrimination from the workplace.

Disability Rights Education and Defense Fund (DREDF) is a national disability civil rights law reform organization, dedicated to establishing equal opportunity for over 36 million disabled Americans. As such, DREDF engages in education, advocacy, litigation, and policy reform efforts with a particular focus on the effective enforcement of Section 504.

The Displaced Homemakers Network is comprised of over 1000 local programs that provide education and training services to midlife and older women seeking to enter and reenter the job market. The Network seeks to

increase displaced homemakers' options for economic self-sufficiency.

The Mental Health Law Project (MHLP) is a non-profit public interest organization established in 1972 to protect and expand the legal rights of mentally ill and mentally retarded children and adults. MHLP has represented thousands of people with mental disabilities in individual cases and class actions establishing fundamental rights.

The Mexican American Legal Defense and Educational Fund is a national civil rights organization established in 1967. Its principal objective is to secure through litigation and education, the civil rights of Hispanics living in the United States.

The National Association for Girls and Women in Sport (NAGWS) is a non-profit organization for Girls and Women in Sport. One of our basic interests is in achieving sex equity for athletes and in supporting equity for all individuals. We believe that discrimination cannot continue and, therefore, are in support of this *amicus* brief.

The National Organization for Women, Inc. (NOW) is the largest feminist organization in the United States, and has as its goal to bring full equality to women. Essential to that goal is equal educational opportunity for all women and girls. From its inception NOW has worked on issues of equal education including Title IX and the Civil Rights Restoration Act restoring the full scope of Title IX. NOW has a strong interest in cases such as this one which seek to ensure remedies for victims of discrimination through rigorous enforcement of Title IX.

The NOW Legal Defense and Education Fund is one of the nation's foremost nonprofit advocacy organizations dedicated to the elimination of sex discrimination. Since its inception in 1970, the NOW Legal Defense and Education Fund has been involved in many federal and state cases concerning the issues of sexual harassment, education and women's civil rights.

NOW Legal Defense and Education Fund is especially concerned with the issues raised in this case because of the importance of ensuring that women and girls receive non-discriminatory education under non-discriminatory conditions. Sexual harassment is a serious problem for women and girls in many settings, including housing, employment and education; NOW LDEF is committed to working for adequate relief for all victims of such abuse.

The Older Women's League (OWL) was founded in 1980 to address the concerns of midlife and older women. It currently has over 20,000 members and donors and over 100 chapters in 36 states. Midlife and older women are profoundly affected by the question presented in this case. Equitable access to education and education-related employment opportunities is essential to midlife and older women's economic security.

Women Employed is a national membership association of working women. Over the past sixteen years, the organization has assisted thousand of women with problems of discrimination, monitored the performance of equal opportunity enforcement agencies, analyzed equal opportunity policies, and developed specific, detailed proposals for improving enforcement efforts.

Women's Equity Action League (WEAL) was founded in 1968 as a national, non-profit membership organization sponsoring research, education, litigation and advocacy in order to advance the economic status of women. WEAL supports and recognizes a women's [sic] constitutional right to equal opportunity in education and therefore has an interest in supporting as *amici curiae* the National Women's Law Center in *Franklin v. Gwinnett Public Schools*.

The Women's Law Project (WLP) is a nonprofit law firm dedicated to advancing the status and opportunities of women through litigation, public education and public policy advocacy. WLP believes that access to equal educational opportunities is essential to achieving equal rights for women, and has litigated extensively during the past 15 years to achieve educational equity for women and girls. The Women's Law Project therefore has a strong interest in the availability of strong and effective remedies under Title IX of the Education Amendments of 1972, including compensatory damages.

S. Rep. No. 388, 99th Cong. 2d Sess. 1, 27-28, 41 (1986)

Calendar No. 809

99TH CONGRESS *2d Session*	)	SENATE	((	REPORT 99-388

REHABILITATION ACT AMENDMENTS OF 1986

AUGUST 8 (legislative day, AUGUST 4), 1986 –
Ordered to be printed

Mrs. HAWKINS (for Mr. HATCH), from the Committee on Labor and Human Resources, submitted the following

REPORT

[To accompany S. 2515]

The Committee on Labor and Human Resources, to which was referred the bill (S. 2515) to reauthorize the Rehabilitation Act of 1973, to authorize a supported employment program for severely disabled individuals, and for other purposes, having considered the same, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

CONTENTS

I. SUMMARY OF THE BILL

As approved by the Senate Committee on Labor and Human Resources, the Rehabilitation Act Amendments of 1986 reauthorizes the Rehabilitation Act programs through fiscal year 1990.

The bill amends the purpose of the Rehabilitation Act contained in Section 208 of the Act, to maximize the employability, independence and integration into the work place and the community of handicapped individuals as a purpose of the programs authorized under the Act.

Section 102 of the bill requires the Secretary of Education to ensure that the staffing of the Rehabilitation Services Administration is in sufficient numbers and at levels that will maintain quali-

* * *

be able to continue to meet the needs of these discrete groups while seeking to serve individuals with a range of disabilities.

TITLE XI – HELEN KELLER NATIONAL CENTER

Section 901. Reauthorization

Section 901 of the Committee bill amends Section 205(a) of the Helen Keller National Center Act to extend authorization of this program at such sums as necessary through 1990.

TITLE X – TECHNICAL AND MISCELLANEOUS PROVISIONS

Section 1001. Technical amendments

Section 1001 of the Committee bill makes numerous technical and conforming amendments.

Section 1002. President's Committee on Employment of the Handicapped

Section 1002 of the Committee bill amends the authorizing legislation for the President's Committee on Employment of the Handicapped so that such committee shall be guided by the general policies of the National Council on the Handicapped. The Committee believes that the President's Committee on Employment of the Handicapped should coordinate its activities with those of the National Council on the Handicapped to provide a cohesive approach to meeting the employment needs of our nation's disabled citizens.

Section 1003. Civil rights remedies equalization

Section 1003 of the Committee bill clarifies the intent of Congress where violations of Section 504 by recipients of Federal financial assistance are concerned.

These provisions are derived from S. 1579 and Amendment No. 584 thereto, introduced on August 1, 1985, by Senator Cranston, and cosponsored by Senators Stafford, Kennedy, Weicker, Kerry, Riegle, Simon, Burdick and Metzenbaum.

The Supreme Court in *Atascadero State Hospital v. Scanlon*, 473 U.S. ___, 87 L.Ed.2d 171, 105 S.Ct. 3142 (1985), held that the Eleventh Amendment bars suits against States and State agencies in Federal court for retroactive monetary relief under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. Sec. 794. Justice Powell, writing for the majority, noted that the Eleventh Amendment bars a citizen from bringing suit against his or her own State in Federal court but that there are certain

exceptions to this prohibition. The Court stated explicitly that these exceptions include a waiver of immunity by a State and congressional power to limit the amendment when legislating pursuant to Section 5 of the Fourteenth Amendment and clearly implied that an exception could be provided under the spending Clause. Justice Powell found that none of these exceptions applied here because a state waiver was lacking and Congress had not abrogated the Eleventh Amendment by an unequivocal expression of congressional intent.

The Supreme Court's decision misinterpreted congressional intent. Such a gap in Section 504 coverage was never intended. It would be inequitable for Section 504 to mandate state compliance with its provisions and yet deny litigants the right to enforce their rights in Federal courts when State or State agency actions are at issue. In order to make certain that the States are covered by Section 504, the Rehabilitation Act Amendments of 1986 provide that states shall not be immune under the Eleventh Amendment from suit in Federal court for violations of Section 504. In addition, since language similar to that of Section 504 is contained in Title IX of the Education Amendments of 1972, 20 U.S.C. Sec. 1681, Title VI of the Civil Rights Act of 1964, 42 U.S.C. Sec. 2000d, and the Age Discrimination Act of 1975, 42 U.S.C. Sec. 6102, these statutes have also been included in the specific abrogation of state immunity in the Committee bill. Other Federal statutes which prohibit discrimination by recipients of Federal financial asistance [sic] are also included. Section 1003 also explicitly provides that in a suit against a State for a violation of any of these statutes, remedies, including monetary damages, are available to the same

extent as they would be available for such a violation in a suit against any public or private entity other than a State. This is in keeping with our intent to provide litigants in cases against States and State agencies the same protection they have in other situations.

Finally, this provision takes effect with respect to violations that occur in whole or in part after the date of enactment of this legislation.

IV. Tabulation of Votes Cast in Committee

In Executive Session of the Committee on Labor and Human Resources on Wednesday, August 6, 1986, S. 2515 as amended, passed unanimously.

V. Cost Estimate

U.S. Congress,
Congressional Budget Office,
Washington, DC, August 8, 1986.

Hon. Orrin G. Hatch,
Chairman, Committee on Labor and Human Resources,
U.S. Senate, Washington, D.C.

Dear Mr. Chairman: The Congressional Budget Office has prepared the attached cost estimate for S. 2515, the Rehabilitation Act Amendments of 1986, as ordered reported by the Senate Labor and Human Resources Committee on August 6, 1986.

If you wish further details on this estimate, we will be pleased to provide them.

With best wishes,
Sincerely,

Edward Gramlich
(For Rudolph G. Penner).

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

1. Bill number: S. 2515.

2. Bill title: Rehabilitation Act Amendments of 1986.

3. Bill status: As ordered reported by the Senate Committee on Labor and Human Resources on August 6, 1986.

* * *

TITLE IX – HELEN KELLER NATIONAL CENTER

Section 901. Reauthorization

This section amends section 205(a) of the Helen Keller Center Act to authorize such sums as may be necessary through FY 1990.

TITLE X – TECHNICAL AMENDMENTS AND MISCELLANEOUS PROVISIONS

Section 1001. Technical Amendments

This section consists of technical amendments to the Act.

Section 1002. Presidents Committee on Employment of the Handicapped

This section provides that the President's Committee on Employment of the Handicapped is to be guided by the general policies of the National Council on the Handicapped.

Section 1003. Civil Rights Remedies Equalization

This section provides that a State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973, title IX of the Education Amendments of 1972, the Age Discrimination Act of 1975, title VI of the Civil Rights Act of 1964, or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance. In a suit against a State for a violation of any of these statutes, remedies are to be available for such violation to the same extent as such remedies are available for such a violation in the suit against any public or private entity other than a State. These provisions are to take effect with respect to violations that occur in whole or in part after the date of enactment of the Rehabilitation Act Amendments of 1986.

Section 1004 Effective Date

This section provides that the Rehabilitation Act Amendments of 1986 are to take effect October 1, 1986.

VIII. Changes in Existing Law

In compliance with rule XXVI paragraph 12 of the Standing Rules of the Senate, the following provides a

print of the statute or the part or sections thereof to be amended or replaced (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

Rehabilitation Act of 1973

(as amended by public law 98-221)

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act with the following table of contents, may be cited as the "Rehabilitation Act of 1973").

CERTIFICATE OF SERVICE

I nereby certify that on July 7, 1989, copies of the foregoing Brief of the National Women's Law Center, *et al.* as *Amici Curiae* was served by first-class mail, postage prepaid, upon:

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Respectfully submitted,

/s/ Marcia D. Greenberger
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